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Supreme Court, U.S.
FILED
06-300 AUG 28 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; KATHLEEN HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHETLER,

Petitioners.

v.

PALMDALE SCHOOL DISTRICT; MICHAEL GEISSER; ARLAND ATWOOD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether public elementary school parents have any constitutionally protected parental rights beyond their choice of where to educate their children.

2. Except for limitations imposed by the Establishment and Treason Clauses, do agents of public elementary schools have unlimited power to subject elementary-aged children to inappropriate, sexually-explicit questions and instruction in any manner, at any time and in any form, despite parental objections?

3. Whether claims of violation of parental rights by parents of public elementary school children must be resolved by balancing the asserted right with the state's asserted interests.

4. Whether parents of elementary-aged children can assert a familial privacy right under the Constitution which must be balanced against a public elementary school's request for compelled disclosure of personal, sexually-explicit information.

PARTIES

The Petitioners consist of James Fields, Tammany Fields, Stuart Haberman, Kathleen Haberman, Robert Hoaglin, Kathie Hoaglin and Vanessa Shetler. The Petitioners will be referred to collectively as "Plaintiffs" and "Petitioners."

The Respondents include the Palmdale School District, Michael Geisser, as Director of Psychology for Palmdale School District ,and Arland Atwood, as Principal of Mesquite Elementary. The Respondents will be referred to individually by name, as the "school district," the "district," or collectively as "Defendants" and "Respondents."

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 427 F.3d 1197. (App. 1a - 28a). The *per curiam* opinion of the panel declining to hear the matter *nostra sponte*, which reaffirmed, amplified and amended the original decision, is reported at 447 F.3d 1187. (App.29a - 36a). The order of the Ninth Circuit Court of Appeals denying the petition for rehearing *en banc* is unreported, No. 03-56499 (May 30, 2006). (App. 51a - 52a). The opinion of the District Court dismissing the federal claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and dismissing the state law claims without prejudice on jurisdictional grounds is reported at 427 F. Supp. 2d 1217. (App. 37a - 50a).

JURISDICTION

The opinion of the Court of Appeals was filed on November 2, 2005. The Court of Appeals denied rehearing *en banc* on May 30, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the First, Ninth and Fourteenth Amendments to the United States Constitution. The constitutional and statutory provisions involved are each are set out verbatim with appropriate citations in Appendices E through J. (App. 53a - 56a).

STATEMENT OF THE CASE

This Court has held that certain parental rights and rights to privacy are guaranteed by the Constitution to be free from unwarranted intrusion by the states. Such rights are held to be fundamental liberty interests. This case presents questions of the scope of those rights when parents place their children in public elementary schools. Because the federal claims were dismissed without leave to amend, the Court must not only accept as true the allegations of the complaint, it must consider whether the Plaintiffs could ever state a federal claim for relief under any theory. Accordingly, the following statements are alleged in the complaint.

The Plaintiffs are parents of elementary school students who were subjected to a sexually-explicit psychological assessment survey when they were ages seven through ten. Some parents were tricked into consenting to the study. Other parents never gave consent.

In December 2001, Kristi Seymour obtained from school officials the addresses for parents of first, third and fifth grade students at Mesquite Elementary. Volunteering as a "mental health counselor" at Mesquite Elementary while pursuing her master's degree, she obtained permission from school district personnel to administer a psychological assessment survey to students in the elementary school. She mailed parents a letter in school district envelopes stating that the district was asking for their support in a district-wide study. The claim that the study was "district-wide" was false. The letter further mischaracterized the study as a collaborative effort with The California School of Professional Psychology-CSPP/Alliant International University, Children's Bureau of Southern California and Palmdale School District.

The study involved administering a psychological

assessment survey to the children. The survey purported to be designed to "identify internal behaviors such as anxiety and depression and external behaviors such as aggression and verbal abuse." The letter asked the parents for their written consent without disclosing that their children would be required to answer sexually-explicit questions regarding sexual activity, sexual thoughts and sexuality. At least one of the Plaintiffs asked Seymour for more information about the survey, but Seymour still did not disclose the sexually explicit nature of the survey. Even though two of the Plaintiff parents did not consent, Seymour nevertheless administered the survey to all the Plaintiffs' children.

The psychological assessment survey, given to first-grade children as young as *seven,* contained seventy-nine questions, including a number of sexually-explicit questions. Children were required to respond "never," "sometimes," "lots of times," or "almost all the time" to queries, including: "Touching my private parts too much," "Thinking about having sex," "Thinking about touching other people's private parts," "Thinking about sex when I don't want to," "Not trusting people because they might want sex," "Getting scared or upset when I think about sex," "Having sex feelings in my body," "Can't stop thinking about sex," and "Getting upset when people talk about sex." The children were also asked whether they had been touched by someone, on their body, that made them feel uncomfortable.

At the time the psychological assessment survey was administered, California law required informed parental consent before public school students could be subjected to tests, questionnaires, surveys or examinations about their personal beliefs or sexual practices. (App. 62a). The law further permitted parents the right to choose to exclude their children from participating in any psychological testing, (App.

57a - 59a), as well as portions of any class where the functions and process of sexual organs were described or discussed, (App. 63a - 64a). Had the Plaintiffs known the true nature of the assessment, none would have consented and all would have opted to ask to have their children excluded.

The offensive survey shocked and shamed the children and robbed them of their innocence. The parents were denied the opportunity and the discretion to introduce their children to the subjects of masturbation, sexual imagery, lust, sex, sexual opportunism, sexual anxiety, sex drive, sexual compulsions and sexual assault at times and in settings they deemed appropriate.

Pursuant to 28 U.S.C. §1331, the complaint raised federal claims of jurisdiction predicated on the U.S. Constitution and 42 U.S.C. §1983. On the constitutional claims, Plaintiffs cited deprivation of the "right to control the upbringing of their children;" the right to raise their children "in a manner appropriate to the child's development and in accordance with the parent's beliefs," a "basic civil right of man;" the "parents' right to control the upbringing of their children by introducing them to matters of and relating to sex and in accordance with their personal and religious values and beliefs;" the "Constitutionally protected right of privacy;" and "the Fourteenth Amendment to the United States Constitution."

The District Court correctly noted that the parents never claimed the school had no right to teach their children about sex or sexual activity. (App. 46a n.8). Rather, the parents claim a right to control when such topics are *first* introduced to their children and to require the school district to follow the informed consent procedure, so that an objecting parent could avoid having their child introduced to all those sexually-explicit topics through a psychological assessment survey.

In analyzing a motion to dismiss, the District Court condensed all of Plaintiffs' federal constitutional claims down to a Fourteenth Amendment substantive due process claim. (App. 9a). The District Court then dismissed the federal claims without leave to amend, finding a "lack of a cognizable legal theory." (App. 38a). The supplemental state claims were dismissed without prejudice for lack of jurisdiction. (App. 50a).

Plaintiffs appealed the dismissals of the federal claims. Rather than finding that the fundamental right asserted was ill-defined or improperly pled, the Ninth Circuit affirmed the dismissal without permitting leave to amend. The Ninth Circuit's sweeping decision precludes parents from making any constitutional claim against a public school with the exception of a claim for violation of the Treason Clause or the Establishment Clause! (App. 3a, 21a - 22a, 28a). The Ninth Circuit opined that, with the exception of the Establishment and the Treason Clauses, parents have no constitutional right to control anything concerning their children in public school. (App. 16a - 17a). It reasoned that the school could not impinge on any liberty interest protected by substantive due process. (App. 18a - 19a). According to the Ninth Circuit, parents who send their children to public school must brace themselves for the shocking reality that they relinquish their parental rights while their children are at school. The Ninth Circuit concluded that parents have no ability to act as parents during the public school day. As an alternative holding, the Ninth Circuit applied rational basis review to the parents' federal claims, having found strict scrutiny could not apply. (App. 21a - 22a).

The subsequent petition for rehearing *en banc* was met with a panel *nostra sponte* decision that reaffirmed, amplified and slightly amended the first opinion. (App. 30a - 36a). The

rehearing *en banc* motion was then denied. (App. 51a-52a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision conflicts with this Court's long-standing precedent that fit parents have a fundamental right to direct the upbringing of their children. This Court has never held that public school officials *replace* the parents' prerogatives on when and how their children are introduced to matters concerning sex and sexuality.

The Ninth Circuit's opinion also conflicts with other federal appeals courts that have resolved such questions only after balancing parental rights with state interests.

Under the Ninth Circuit's decision, America's public schools should come with a warning label: "CAUTION! Your parental rights are severed while your child is at school. You will have no right to notice nor right to object to any activity or materials utilized on campus, sexual or otherwise, during the school day. With the exception of treason, the school has absolute and incontestable authority to say and do whatever it decides, no matter how objectionable or inappropriate, to any child, at any age, at any time, in any manner." The decision presents this Court with an issue of exceptional importance.

I.

THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ON PARENTAL RIGHTS.

A. The Ninth Circuit's Unprecedented Bright Line Rule Wrongly Eliminates the Balancing of Interests Demanded by this Court.

The Ninth Circuit's decision is so broad that it eviscerates parental rights previously recognized by this Court. According to the opinion, parents "have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, **sexual or otherwise, when and as the school determines** that it is appropriate to do so." (App. 16a)(emphasis added). The Ninth Circuit categorically found that any parental right to make important and intimate decisions could never constitutionally preclude the state from disseminating (and presumably collecting) information it deems appropriate to their children unless it was treasonous or violates the Establishment Clause. (App. 21a, 35a - 36a). The Ninth Circuit reached that bright line conclusion without any weighing or balancing the relative interests of the parties.

There may be some disagreement about the precise grounding of constitutional parental rights. Those rights have variously been cited as emanating from the First, Fourth, Fifth, Ninth and Fourteenth Amendments, as well being among the unalienable rights, intrinsic human rights and intertwined with the familial right of privacy. Even so, there can be no dispute that parents have a fundamental liberty interest protected by the Fourteenth Amendment to make

decisions concerning the care, custody and control of their children.[1] Aside from the dispute over how that right is balanced, this dispute is also over how that right is defined. The Ninth Circuit limited the right to choosing public or private school, concluding that parents' fundamental interests can never overcome the interests of public schools in educating their children free from parental interference. Plaintiffs maintain that their rights continue throughout the school day, especially when their seven-year-old first-grader is asked how often he is "thinking about having sex" and "thinking about touching other people's private parts."

The fundamental liberty interest of fit parents to direct the upbringing of their children is well-established. The liberty interest of parents in the "care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Indeed, the right of a parent to control his child's upbringing is one of the few fundamental rights protected under the doctrine of substantive due process.

Parents have the right to choose whether to send their children to public or private schools, *Pierce v. Society of*

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[1] The "*Meyer-Pierce-Yoder* 'parental' right and the privacy right . . . may be no more than verbal variations of a single constitutional right." *Runyon v. McCrary*, 427 U.S. 160, 178 n.15 (1976). This Petition, therefore, will characterize Plaintiffs' interest as the fundamental liberty interest of parents to direct the upbringing of their children, which, at a minimum, includes the right to exclude their children from being introduced to sexually-explicit subjects by a public elementary school and, separately, the right for families to be free from being compelled to disclose personal, sexually-explicit information to an agent of the public schools.

Sisters, 268 U.S. 510 (1925), to object to language instruction, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to exempt them from compulsory school attendance. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Meyer*, this Court explained that parents have a fundamental liberty interest in establishing a home and bringing up children and that the right includes a "natural duty of the parent to give his children education suitable to their station in life . . . ." 262 U.S. at 399-400. Two years later, this Court held that a law requiring public school attendance "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534. Expanding on *Meyer*, the Court explained that the **"child is *not* the mere creature of the state**; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 534-35 (emphasis added).

In *Yoder*, this Court again acknowledged the fundamental interest that parents have in directing the upbringing of their children and ruled that the State's interest in public education cannot infringe upon those rights, "such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . .." 406 U.S. at 214. The parents' duty to prepare a child for additional obligations "include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* at 233. This Court explained that the result would have been different had the parents' interest been "nothing more than the general interest of the parent in the nurture and education of

his children . . . ." *Id.* at 233.[2]

In *Troxel*, this Court affirmed its historic recognition of the fundamental liberty interest of parents. 530 U.S. at 65-66. *See also Parham v. J.R.*, 442 U.S. 584, 602 (1979) (recognizing that "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"). *Troxel* reaffirmed the "presumption that fit parents act in the best interests of their children." 530 U.S. at 68.

That presumption is particularly relevant here, where the Ninth Circuit concluded that schools have the right to provide students with whatever information state officials wish on sexual matters, to whomever, at whatever age, in whatever manner, even when fit parents object based on religious or moral convictions. (*See* App. 16a). When a child passes through the public school house doors, he does not become a mere creature of the state. Fundamental parental rights – which encompass the *Yoder* inculcation of moral standards –

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[2] The Ninth Circuit quotes a concurring opinion in *Yoder* for the proposition that parents may not "replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." 406 U.S. at 239. (App. 13a). That concurring opinion, however, further explained that *Pierce* permits the State reasonably to regulate schools and determine that "'certain studies plainly essential to good citizenship must be taught . . . .'" *Id.* at 240 n.2 (quoting *Pierce*, 268 U.S. at 534). Permitting schools to determine what subjects should be taught to achieve good citizenship presents a vastly different issue than whether a school can administer a sexually-explicit psychological assessment survey to elementary students without informed parental consent.

vest in parents and can not unilaterally be displaced or arrogated. The Ninth Circuit's decision renders parents helpless to oppose a school's decision to administer sexually-explicit psychological assessments to seven-year-olds. That construction leaves parents unable to intercede and protect their children from the harm they believe ensues from premature sexualization of children. How can courts stand down when this Court declared, "The Fourteenth Amendment, as now applied to the States, protects the citizens against the State itself and all of its creatures – Boards of Education not excepted."? *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The Ninth Circuit's decision castrates Supreme Court precedent. It is an assault on parental authority.

The parents here do not argue that their rights are absolute, but that their asserted rights cannot be simply dismissed without considering whether the governmental interference is justified. Rather than presuming that the parents will act in their child's best interest, as this Court required in *Troxel*, the Ninth Circuit irrebuttably presumes that the *school* will act in the child's best interest as *parens patriae* and that parents can raise no federal claim that can contradict that presumption.

The state's interest in public education "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children . . . ." *Yoder*, 406 U.S. at 213-214.

In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court explained that the state as *parens patriae* may, under certain circumstances, restrict the parents' rights. However, the Court expressly limited the scope of its holding: "The religious training and indoctrination of children may be

accomplished in many ways . . . .These and all others except the public proclaiming of religion on the streets . . . *remain unaffected by the decision.*" *Id.* at 175 (emphasis added). *Yoder* establishes that where the right of parents to direct the religious and moral upbringing of their children is implicated, strict scrutiny should be applied. 406 U.S. at 214-215, 233.[3] *Yoder* also limited *Prince* to the proposition that a state can override a parent's decision where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 233-234.

Parental determinations on issues central to raising their children morally must be accorded some special weight in determining whether the state overstepped its bounds and infringed on the fundamental rights of parents to make child-rearing decisions. *See Troxel*, 350 U.S. at 70. The family's privacy interest in the upbringing and education of children is "protected by the Constitution against *undue* state interference." *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (plurality opinion) (emphasis added). If the parents' authority in rearing their children is not absolute outside their household, *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), the school's intrusion must at least be justified by a compelling state interest. *See Employment Div. of Oregon*, 494 U.S. at 881 (compelling interest test applies to fundamental constitutional protection of parental right to direct education of children).

"Thus when the government intrudes upon choices

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[3] The same result is reached under what has come to be known as the hybrid rights doctrine. *See generally Employment Div. of Oregon v. Smith*, 494 U.S. 872, 881-882(1990).

concerning the arrangement of the household, this Court has carefully examined the 'governmental interests advanced and the extent to which they are served by the challenged regulation.'" *Hodgson,* 497 U.S. at 447 (quoting *Morre v. East Cleveland*, 431 U.S. 494, 499(1977)); *see also Santosky v. Kramer*, 455 U.S. 745, 766-768 (1982)(termination of parental rights); *Parham*, 442 U.S. at 605 (institutional commitment of minors); *Prince*, 321 U.S. at 166-170 (child street vending prohibition). Specifically, making the private realm of family life conform to some state-designed ideal is not considered a legitimate state interest. *Hodgson,* 497 U.S. at 452 (citing *Meyer*, 262 U.S. at 399-400). However, the state's interests are sufficiently compelling to justify random drug testing of middle and high school athletes *whose parents give informed consent. Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664-665 (1995).

Without giving any weight to the parents' fundamental interests, the Ninth Circuit decided as a matter of law that the Plaintiffs had not stated, *and could not amend their complaint to state, any set of facts upon which a federal court could grant relief.* (App. 22a). It flatly rejects any balancing of the competing interests of the parents and the schools, thereby emasculating the fundamental due process right in the public school setting. Under the Ninth Circuit Court's reasoning, no trial court would ever engage in any *Yoder* balancing of parental rights with the state's claimed interest in the public school setting. This Court should grant *certiorari* to ensure that constitutional protection of parental rights requires weighing of the respective interests.

B. The Ninth Circuit Decision Fails to Recognize Procedural Due Process Rights Outlined by this Court.

This case involves much more than a dispute over teaching methodologies or a run-of-the-mill curriculum challenge. It involves protection of one of the core beliefs upon which the country was founded, "the fundamental liberty interest of natural parents in the care, custody, and management of their children." *Santosky*, 455 U.S. at 753. "The interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). That right warrants the deference and protection encompassed in the rights to procedural due process under the Fifth and Fourteenth Amendments. *Id.* The state cannot utilize unconstitutional means, such as denial of proper notice and a hearing, to accomplish its otherwise legitimate goals. *Id.* That is particularly true, when, as is true in this case, state law prescribes certain procedural prerequisites aimed at protecting fundamental rights.

California parents have the right to receive information about any psychological testing that a public school would do involving their child and to deny the school permission to give the test. *Cal. Educ. Code* § 51101(a)(13)(2001). Section 51513 of the Code further provides:

> No test, questionnaire, survey, or examination containing any questions about the pupil's *personal beliefs or practices in sex*, family life, morality, and religion . . . shall be administered to any pupil in

> kindergarten or grades 1 to 12, inclusive, unless the parent or guardian of the pupil is notified in writing that this test, questionnaire, survey, or examination is to be administered and the parent or guardian gives written permission for the pupil to take this test, questionnaire, survey, or examination.

Cal. Educ. Code § 51513 (2001)(emphasis added). Other sections of the Education Code prescribe similar procedures aimed at protecting the parents' religious and moral beliefs. *See, e.g., Cal. Educ. Code* § 51550. Plaintiffs alleged that the district denied them their opportunity to give informed consent, denied them their right to exclude their children from psychological testing and denied them the right to provide the required written permission. Those allegations standing alone state a claim for violation of procedural due process sufficient to overcome a motion to dismiss.

The Ninth Circuit cast aside this obvious due process violation and the long-standing protection of parental rights in favor of its concept that parental rights extend no farther than the choice between public and private school. Conditioning receipt of public education on parents relinquishing all control over their children during the school day, even those protections codified in law, as the Ninth Circuit has done, is abhorrent to the Constitution.

While some members of the Court might debate the scope of substantive due process guarantees afforded parents to direct the education of their children in public schools, it is undisputed that, at a minimum, parents retain procedural due process rights when the state recognizes parental authority. Whatever the reaches of substantive due process might be, it should not be disputed that parents have the enforceable right to object to sexually-explicit psychological assessments being

administered to their elementary school children. Certainly, the Fourteenth Amendment should guarantee their opportunity to opt their children out of a sexually-explicit inquiry that shocks their parental conscience. The Ninth Circuit's decision precludes any such constitutional claim by these parents.

C. The Ninth Circuit Court Misapplied this Court's Dismissal Standards.

It bears emphasis that Plaintiffs' claim that administering the sexually-explicit psychological assessment violated their fundamental rights was dismissed on a Rule 12(b)(6) motion. The Ninth Circuit failed to accept allegations of the complaint as true and wrongly drew inferences in favor of the Defendants, both in violation of this Court's precedents.

This Court's standard for evaluating a Rule 12(b)(6) motion is well-settled. In conducting the *de novo* review, all factual allegations in the complaint are accepted as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). A Rule 12(b)(6) dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. *Id.*; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1956). The District Court's dismissal of a complaint without leave to amend is improper unless it is clear that the complaint could not be saved by *any* amendment.

The Ninth Circuit's decision sidesteps decades of Supreme Court precedent. The Ninth Circuit acknowledged that this Court identified a constitutionally protected privacy interest in the right to control the disclosure of sensitive information. (App. 20a) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)). *See also Smith v. Organization of Foster*

Families for Equality and Reform, 431 U.S. 816, 842 (1977) (private realm of family life which the state cannot enter has been afforded both substantiative and procedural protection). However, remarkably, the Ninth Circuit concluded that the Plaintiffs "do not allege that their children were forced to disclose private information." In a footnote, the Ninth Circuit then concluded that it did not, therefore, consider any question of compulsory disclosure of personal or sensitive information. (App. 20a n.8).[4] The Ninth Circuit's conclusion is not only wrong concerning the allegations in the complaint, it undercuts the court's ultimate conclusion that the parents could not state a federal claim.

The complaint alleged that Seymour administered a psychological assessment survey to the children containing several explicit questions regarding sex and sexual activity (with a copy attached as an exhibit), required them to respond to all of the questions, including those sexually-explicit in nature, and that, in compliance with Seymour's instructions, the children answered the questions, including those that were sexually-explicit and adult- oriented.[5] The complaint alleged a reasonable expectation of privacy and an insufficient justification to use the children as research subjects, particularly when compelling responses to sexually-explicit and adult-oriented topics. The complaint asserts a

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[4] Later, the Ninth Circuit wrongly suggests that no private information was even disclosed. (App. 36a).

[5] Although this Court had not expressed its thoughts on the matter, it is noteworthy that those types of questions have recently been found to request "intimate and private" information. *See C.N. v Ridgewood Bd. Of Educ.*, 430 F.3d 159, 180 (3d Cir. 2005).

constitutional right of privacy, the invasion of which is continually threatened without a court's declaration of those rights. Even so, if the pleading of the federal claim to privacy was inadequate, the appropriate ruling would be dismissal with leave to amend.

When the Ninth Circuit considered whether the district's actions could survive a rational basis examination (an alternative holding), it found a rational basis notwithstanding contrary allegations of the complaint, a second example of misapplication of the dismissal standard. In so doing, the Ninth Circuit gave unqualified credence to the contents of the letter soliciting parental consent. (App. 22a - 27a). Plaintiffs attached the letter to the complaint but alleged it was false, a pretense, made for the purpose of deceiving, an inaccurate disclosure, and deliberately incomplete. Moreover, the complaint alleged Defendants had no justification or proper purpose for their actions. Despite those allegations that the court had to accept as true, the Ninth Circuit found that the letter "set[ ] forth the legitimate governmental purpose of the survey." (App. 22a - 23a). That plainly conflicts with this Court's standards for reviewing a dismissed complaint.

The Ninth Circuit, therefore, misapplied the standard twice when it concluded that Plaintiffs could not prove any set of facts in support of their federal claims. The Ninth Circuit concluded that, other than a claim of treason, there is no opportunity for parents to raise any constitutional claim – not privacy, not substantive due process, not procedural due process grounded in state-recognized rights or even the Establishment Clause.

The Ninth Circuit repeatedly noted that it was not commenting on and was reserving all First Amendment issues (App. 18a n.7, 33a & 35a). Nevertheless, it affirmed and reaffirmed a dismissal that precluded the parents from

amending their federal claims (App. 3a, 28a), and further, expressly declined to remand for any amendment (App. 22a). The Ninth Circuit's decision sweeps more broadly than necessary by affirming a dismissal without remanding for leave to amend. Since this case came to the court on appeal of a Rule 12(b)(6) order, all pleadings and presumptions should have been interpreted in favor of the Plaintiffs and the burden of demonstrating that there exists no possible claim upon which relief can be granted should have been on Defendants. The Ninth Circuit mistakenly drew inferences in favor of Defendants as to whether Plaintiffs could ever allege and prove a claim for federal relief. The opinion is so broad that it prohibits Plaintiffs from ever amending their federal complaint. At a minimum, the Ninth Circuit should have remanded to permit the parents to amend their complaint. This Court should grant *certiorari*.

II.

THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE SECOND, THIRD, FOURTH, FIFTH AND ELEVENTH CIRCUITS ON PARENTAL RIGHTS IN THE SCHOOL SETTING.

As noted above, the unprecedented bright line rule announced by the Ninth Circuit fails to allow for any consideration of the relative interests of the parents. Not only does elimination of any balancing test run counter to this Court's standards, it conflicts with numerous circuit courts.

Circuit courts have also applied a balancing test to resolve disputes pitting parental rights against asserted state interests. *See, e.g., Arnold v. Bd. of Educ.*, 880 F.2d 305, 314 (11th Cir.

1989) ("[A] reasonable accommodation must be found by balancing the traditional rights of parents in the rearing of their children and the interest of the state in controlling public schools.");[6] For instance, in *C.N. v. Ridgewood*, the Third Circuit employed a balancing test that considers the importance of the parental decision alleged to have been usurped by the school board against the state interest served by the intrusion. 430 F.3d 159. In so doing, the Third Circuit opinion, joined by then-Judge Alito, expressly disagreed with the very Ninth Circuit decision at issue here for categorically dismissing any parental rights claim of a public school parent without any weighing of factors. *Id.* at 185 n.26. Unlike the bright line rule created by the Ninth Circuit, the Third Circuit looks at the facts and strikes a nuanced balance between the parents' rights and the school's interest.

Unlike the Ninth Circuit, the Third Circuit recognizes that there are some limitations on intrusions by school officials:

> School sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. Public schools must not forget that '*in loco parentis*' does not mean 'displace parents.'
>
> It is not educators, but parents, who have primary

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[6] *Arnold* was subsequently overruled on other grounds in that it required Federal Rule of Civil Procedure Rule 8 to be more rigidly applied to Section 1983 cases. *Swann v. Southern Health Partners, Inc.*, 388 F. 3d 834, 837 (11th Cir. 2004).

> rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the [Supreme] Court's admonitions that the child is not the mere creature of the State, and that it is the parents' responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship.

Gruenke v. Seip, 225 F.3d 290, at 307 (internal citations and quotations omitted). The *Gruenke* decision finds unconstitutional interference where a public school coach forced a student athlete to take a pregnancy test and reveal the results. *Id.*, 225 F.3d at 304-307. The Third Circuit concludes that the athlete's parents state a claim for violation of their familial right to privacy. *Id.* Under the Ninth Circuit's bright line rule, those parents would have no such claim.

Similarly, the Eleventh Circuit found a properly pled cause of action against school officials and a school board for violations of parental rights. *Arnold,* 880 F.2d 305. That court held:

> a parent's constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion, a decision which touches fundamental values and religious beliefs parents wish to instill in their children.

Arnold, 880 F.2d at 312. The court explained that, "[w]ithin the constitutionally protected realm rests the parental freedom to inculcate one's children with values and standards which

the parents deem desirable." *Id.* at 313 (citing *Runyon*, 427 U.S. at 177).

In *Arnold*, the parental rights extended through the school day to preclude school officials from unilaterally assuming a traditional parental role involving intimate and private familial matters. Similarly, here, the parents' interest in directing the upbringing of their children permits them to require the school to obtain informed parental consent before subjecting their elementary school children to a psychological assessment involving the introduction of sexually-explicit topics. Plainly, the Ninth Circuit's decision infringes the "parental freedom to inculcate one's children with values and standards which the parents deem desirable." It thus conflicts with the Eleventh Circuit, too.

The Ninth Circuit's decision also conflicts with numerous circuit courts that have held that parental rights do exist in the school setting beyond the parents' choice of where to send their children to school, and that those rights are subject to constitutional protection, albeit afforded only rational basis review. In *Immediato v. Rye Neck School District*, 73 F.3d 454, 462 (2d Cir. 1996), parents of a high school student claimed that a school district's mandatory community service hours violated their parental rights to direct their child's education. The Second Circuit recognized that "[t]here is a long line of precedents indicating that the government may not *unreasonably* interfere with the right to raise one's children as one wishes." *Id.* at 461 (internal marks omitted). Based on that precedent, the Second Circuit concluded that when a parental right is asserted for secular reasons, rational basis review applies. *Id.* at 462.

Similarly, the Fourth Circuit has held that a parental right based on secular reasons should be judged by the rational basis standard. *See Herndon v. Chapel Hill-Carboro City Bd.*

of Educ., 89 F.3d 174 (4th Cir. 1996). In *Herndon*, parents challenged a mandatory community service requirement as violative of parental rights. The Fourth Circuit stated, "[T]he Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with equal consistency that *reasonable* regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny." *Id.* at 179.

Likewise, the Fifth Circuit has held that nonreligious objections to a school's uniform policy by parents should be judged by rational basis review. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 290-91 (5th Cir. 2001).

The Ninth Circuit stands alone in holding that parental rights in the school setting are nonexistent beyond the parents' choice of where to send their children to school. While Petitioners do not advocate the implementation of rational basis in this case, it is important to note that other circuit courts hold that parental rights do exist in the school arena and that, at a minimum, they subject those rights to rational basis review.

The Ninth Circuit places great reliance on *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995). (App. 14a - 16a). *Brown* compels no such sweeping, bright line ruling and is easily distinguishable.[7] This Court need not

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[7] Plaintiffs do not suggest that *Brown* was properly decided. Several facts distinguish *Brown*. First, *Brown* involved high school students. *Id.* at 528. This case involves elementary school students at a tender age. Second, *Brown* involved a mandatory AIDS Awareness assembly, which was part of the school's curriculum. *Id.* Here, the survey was not part of the

overrule the First Circuit's *Brown* conclusion that parents do not have the "constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Id.* at 533. The parents at bar simply want the elementary schools to respect their parental opt-out rights concerning sexually-explicit assessments and curriculum, as well as their familial right to not disclose personal sexual information to school personnel.

It takes a significant leap to infer from *Brown* that all school policies and actions – even those manifestly unrelated to the school's educational mission – should be shielded from the parental right with no further inquiry or analysis. The psychological assessment survey at issue should not be shielded from the parental right because it reverses the traditional flow of information. Although every legitimate school interest is not necessarily extinguished by the study not educating the study subjects, it should be incumbent upon the school to demonstrate a sufficiently compelling interest to outweigh the associated interests of the parents at stake.

Neither *Brown* nor any other court has ever held that parents have no rights to challenge a school's decision to

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curriculum but was supposedly administered for research purposes. Third, the *Brown* plaintiffs' children were not required to actively participate in the assembly or reveal their own personal, sexually-explicit information to school personnel, but were required only to passively watch the program. Here, each of Plaintiffs' children were compelled to actively participate and disclose intimate sexual matters without their parents' informed consent.

administer, as part of a research study, a sexually-explicit psychological assessment survey to elementary school children. **The Ninth Circuit stepped into uncharted territory** when it held that all parental rights in determining how their children are raised during the school day are given up when the parents enroll their children in public schools. Accordingly, this Court should grant *certiorari* to resolve this important conflict.

III.

THE NINTH CIRCUIT'S UNPRECEDENTED OPINION RAISES ISSUES OF GREAT PUBLIC IMPORTANCE CONCERNING WHETHER PUBLIC SCHOOL PARENTS LOSE THEIR PREROGATIVE TO INTRODUCE THEIR ELEMENTARY SCHOOL CHILDREN TO SEXUAL MATTERS AND PROTECT THEM FROM POTENTIALLY DAMAGING INTRUSIONS.

No one believes when a child is dropped off at day care, soccer practice, or summer camp that parents cease being parents. Yet, the Ninth Circuit concluded that parents have no ability to act as parents during the school day, essentially handing America's public schools a free pass. Although parents might object to subjecting seven-year-old Susie to probing questions about her sexual thoughts, feelings and experiences, as long as the school does not commit treason, the Ninth Circuit's decision says: "Parents – back off. Susie belongs to the public school. If you don't like what they have done to your child, your only option is to withdraw her from school. Do not come to federal court with your complaint."

The breadth of this decision is staggering. It presents an issue of exceptional importance.

Absent the opportunity of an education, "it is doubtful that any child may reasonably be expected to succeed in life." *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). While parents have the right to homeschool, many lack the necessary skills or available time. Although some parents have the means to send their children to private schools, many lack the financial resources to make that choice. The Ninth Circuit has left parents with a Hobson's choice – beg, borrow and steal to finance private education or relinquish parental rights and place children in public school.

Many parents have no real choice but to send their children to public school, even when those schools are hostile to their religious and moral convictions. If the constitutional guarantees of parental rights mean anything, they must mean that parents should not have to choose between their religious and moral beliefs concerning the appropriate introduction of sexual concepts and providing an opportunity for their children to be educated. *Cf. Barnette*, 319 U.S. at 637 ("Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be the partisan or enemy of any class, creed, party, or faction.").

While courts and lawyers commonly use the expression, "you can't un-ring a bell," no one understands its important truth more than parents of young children. The age and method of introducing certain subjects are sincerely believed to have enormous impact on the subsequent development of children, with impacts lasting even into their adult lives. While passive introduction of sexual subjects may have some effect, forcing a seven-year-old child to actually synthesize his or her thoughts on the whole realm of sexual subjects

sufficiently to respond to numerous sexually-explicit questions is of even graver consequence. The district's unilateral assumption of the role of introducing such personal and intimate matters of great familial, moral and religious significance to children, without their parent's consent, does not merely make the parents' job more difficult or just undermine their authority on the subject, but actually *usurps* the parental role in a way that can never be cured with more speech by the parent. Nothing the parent can do will ever put the genies of masturbation, sexual opportunism, sexual assault, sexual anxiety, sex drive, sexual compulsions, sexual imagery, lust and sex itself back in the bottle. Once opened, Pandora's box cannot be closed for reopening at some later date.

Plaintiffs certainly contend that parents' due process rights should afford them complete relief, but even if members of this Court disagree, the Ninth Circuit decision is so sweeping, the Plaintiff parents pray this Court grants *certiorari* to weigh in on these issues of great public importance, resolve the conflicts and furnish the courts below with definitive guidance on the relative importance of the parents' rights *vis-a-vis* the school district.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

James FIELDS; Tammany Fields; Stuart Haberman; Robert Hoaglin; Kathie Hoaglin; Vanessa Shetler,

Plaintiffs-Appellants,

v.

PALMDALE SCHOOL DISTRICT (PSD); Michael Geisser; Arland Atwood,

Defendants-Appellees.

No. 03-56499.
D.C. No. CV-03-00457-JVS

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
June 2, 2005 – Pasadena, California

Filed November 2, 2005.

Before Donald P. Lay,* Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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OPINION

REINHARDT, Circuit Judge.

When parents of schoolchildren in Palmdale, California learned from their sons and daughters that they had been questioned in their public elementary school about sexual topics such as the frequency of "thinking about having sex" and "thinking about touching other peoples' private parts," some of them exercised their constitutional right to take their grievance to the courts. The questioning was part of a survey the Palmdale School District was conducting

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

regarding psychological barriers to learning. The parents brought an action in district court against the School District and two of its officials for violating their right to privacy and their right "to control the upbringing of their children by introducing them to matters of and relating to sex." They brought both federal and state claims. The district court dismissed the federal causes of action for failure to state a claim upon which relief could be granted and dismissed the state claims without prejudice to their right to re-file in state court. We agree, and hold that there is no fundamental right of parents to be the *exclusive* provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it. We also hold that parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students. Finally, we hold that the defendants' actions were rationally related to a legitimate state purpose.

I.

Kristi Seymour volunteered as a "mental health counselor" at Mesquite Elementary School while she was enrolled in a master's degree program at the California School of Professional Psychology. The Palmdale School District, of which Mesquite was a part, collaborated with the School of Professional Psychology, the Children's Bureau of Southern California, and Seymour to develop and administer a psychological assessment questionnaire for first, third, and fifth grade students with the announced goal of "establish[ing] a community baseline measure of children's

exposure to early trauma (for example, violence)."

Prior to administering the survey, Seymour mailed a letter to the parents of the children to be surveyed informing them of the questionnaire's nature and purpose, and requesting their consent to its administration[1]. The parental consent letter was

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[1] The letter states:

"Parental Consent

Dear Parent or Caregiver:

The Palmdale School District is asking your support in participating in a district-wide study of our first, third and fifth grade children. The study will be a part of a collaborative effort with The California School of Professional Psychology-CSPP/ Alliant International University, Children's Bureau of Southern California and the Palmdale School District.

The goal of this assessment is to establish a community baseline measure of children's exposure to early trauma (for example, violence). We will identify internal behaviors such as anxiety and depression and external behaviors such as aggression and verbal abuse. As a result, we will be designing a district wide intervention program to help children reduce these barriers to learning, which students can participate in. Please read this consent letter and if you agree, please sign and send it back to your school's principal no later than December 20, 2001.

The assessment will consist of three, twenty-minute self-report measures, which will be given to your child on one day during the last week of January. This study is 100% confidential and at no time will the information gathered be used to identify your child. Your child will not be photographed or videotaped. You may refuse to have

enclosed in a School District envelope and was mailed using School District postage. The letter did not explicitly state that some questions involved sexual topics, although it did specify that the survey questions were about "early trauma

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your child participate or withdraw from this study at any time without any penalty or loss of services to which your child is entitled.

[-page break-]

I am aware that the research study coordinator, Kristi Seymour, one research assistant, the Palmdale School District, Director of Psychology, Michael Geisser, and a professor from CSPP, will be the only people who have access to the study's information. After the study is completed, all information will be locked in storage and then destroyed after a period of five years.

I understand answering questions may make my child feel uncomfortable. If this occurs, then, Kristi Seymour, the research study coordinator, will assist us in locating a therapist for further psychological help if necessary. If I have further questions, I may contact Kristi Seymour at 1529 E. Palmdale Blvd., Suite 210, Palmdale, CA 93550 at 661.272.9997 x128. I understand that I will not be able to get my child's individual results due to anonymity of the children, but I may get a summary report of the study results.

I have read this form and understand what it says. I her[e]by agree to allow my child to participate in this district-wide study." (emphasis in original). Additionally, two lines were made available on the "Parental Consent" form for the "Parent/Caregiver" to sign and date it."

(for example, violence)" and there was a warning that "answering questions may make [the] child feel uncomfortable."

After the School District approved the survey, Seymour administered it during school hours at Mesquite Elementary School. She sat with the students, aged seven to ten, while they completed the survey and ensured that they read and responded to each question. The survey included seventy-nine questions testing the frequency that the subjects experienced a variety of sensations, emotions, thoughts, and experiences. It was composed of four questionnaires. The first questionnaire contains fifty-four questions and is copyrighted by Psychological Assessment Resources, Inc.[2] The children were asked to rate the following activities, among others, on a scale from "never" to "almost all the time": "Bad dreams or nightmares," "Feeling dizzy," "Wanting to yell at people," "Wanting to hurt other people," "Trying not to have feelings," "Can't stop thinking about something bad that happened to me," and "Wanting to kill myself." Ten of those questions were about sexual subjects.[3]The second part of the survey is labeled

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[2] Psychological Assessment Resources, Inc. is a leading publisher of assessment instruments, software, books, and other related materials. *See* http://www.parinc.com (last visited Aug. 16, 2005).

[3] The sexual references are:
8. Touching my private parts too much
17. Thinking about having sex
22. Thinking about touching other people's private parts
23. Thinking about sex when I don't want to

"Bialer-Cromwell LC Scale (Modified)."[4] These questions concentrate on the child subject's perception of other people and the external world. The third part follows the same format as Bialer-Cromwell, but the questions focus upon the children's past traumatic experiences. Among the questions are the following:Have you ever "[B]een threatened or chased by a gang?", "Seen someone get shot?", "Been in a car accident?", "Been touched by someone, on your body, that made your feel uncomfortable?", and "Know[n] anyone who has or is being abused?"The final part is limited to demographic information such as the student's grade, race, and familial living arrangement.

Plaintiffs James and Tammany Fields, Stuart and Kathleen Haberman, Robert and Kathie Hoaglin, and Vanessa Shetler are parents of minor children who were enrolled at Mesquite Elementary School. All of them had children who participated in the survey. The parent-plaintiffs learned of

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26. Washing myself because I feel dirty on the inside
34. Not trusting people because they might want sex
40. Getting scared or upset when I think about sex
44. Having sex feelings in my body
47. Can't stop thinking about sex
54. Getting upset when people talk about sex

[4] The Bialer-Cromwell Locus of Control Scale is a 23-item, "yes-no" questionnaire that measures the extent to which a child construes outcomes as being consequential to his own actions (i.e., internally controlled) rather than due to the whims and/or manipulations of fate, chance, or other people (i.e., externally controlled).

the sexual nature of some of the questions on the survey when their children informed them of the questions after they had completed the questionnaires. The parents allege that if they had known the true nature of the survey, they would not have consented to their children's involvement. Prior to filing in federal court, the parents initially sought redress for their alleged injuries through an administrative tort claim filed with the Palmdale School Board. Therein, they alleged that their "basic constitutional right to control" their children's upbringing had been "robbed" by the defendants' actions. Their claim was denied and they subsequently filed a complaint in district court alleging four causes of action: (1) violation of their federal constitutional right to privacy; (2) violation of their California constitutional right to privacy; (3) deprivation of civil rights pursuant to 42 U.S.C. § 1983; and (4) negligence. The parents sought damages and injunctive relief.

Defendant Michael Geisser is the Palmdale School District's Director of Psychological Services, and Arland Atwood is the principal of Mesquite Elementary School; both Atwood and Geisser are sued in their official capacities.[5] The defendants did not file an answer to the complaint. Instead, they moved under Fed. R. Civ. Pro. 12(b)(6) to dismiss the entire action for failure to state a claim upon which relief could be granted. They asserted that there is no deeply rooted and fundamental right of parents "to control the upbringing of

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[5] Although Seymour was named as a defendant in the complaint, she is not a party to the case. In the notice of appeal, the parent-appellants admit that she "was not served, has not appeared, and is not a party to this appeal."

their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs." They further contended that the § 1983 claim was not viable because the parents' civil rights had not been violated and that even if they had, the School District is immune from suit and the individual defendants are entitled to qualified immunity. Finally, they argued that they are not liable under California law because their actions were discretionary and state law immunity applies.

The parents countered that the administration of the survey violated their constitutional privacy right as well as their right to control their children's exposure to sexual subjects, that the defendants arrogated unto themselves the parents' right to determine how their children learn about sexual matters, and that the defendants are not immune from suit.

After holding a hearing on the motion, the district court dismissed the federal claims for "lack of a cognizable legal theory." In doing so, it first recharacterized the parents' privacy claim as a substantive due process claim because "all of the Parents' arguments concerning the claim are grounded in the Fourteenth Amendment's Substantive Due Process Clause. Other than citing generally to privacy cases outside the Fourteenth Amendment's scope, the Parents do not connect their asserted interest ... to the First, Third, Fourth, Fifth, Ninth, or Tenth Amendments." The court ruled next that the right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" does not rise to the level of a fundamental right protected by Substantive Due Process. It further concluded

that the fundamental right to direct the upbringing and education of one's children does not encompass the right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs." Finally, the court declined to exercise supplemental jurisdiction over the state law causes of action and dismissed them without prejudice. The parents now appeal.

II.

On appeal, the parents challenge the district court's dismissal of their federal claims for failure to state a claim upon which relief may be granted.[6] The district court's dismissal pursuant to Rule 12(b)(6) for failure to state a claim is reviewed *de novo*. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir.2001).

The parents argue that the defendants' actions deprived them of their free-standing fundamental right "to control the upbringing of their children by introducing them to matters of

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[6] Subsequent to the district court's dismissal of the federal causes of action, the court also dismissed without prejudice the state law causes of action on jurisdictional grounds. The parent-appellants' opening brief does not renew their opposition to the district court's dismissal of the state law causes of action. Those issues are therefore waived. *See Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n. 4 (9th Cir.1999) ("Arguments not raised in [an] opening brief are waived."). Of course, the parents may pursue the state law causes of action in state court.

and relating to sex in accordance with their personal and religious values and beliefs." They also contend that the right to "determine when and how their children are exposed to sexually explicit subject matter" is encompassed within their fundamental due process right to control their children's upbringing and their constitutional right to privacy to make intimate familial decisions. They argue that under both doctrines they have a fundamental right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" and that the defendants' actions infringing that right are therefore subject to strict scrutiny. Finally, they maintain that even if the court concludes that the deprivation of their liberty interest in "control[ling] the upbringing of their children by introducing them to matters of and relating to sex" is not subject to strict scrutiny, the School District's administration of the psychological survey was not rationally related to a legitimate state end.

A. Meyer-Pierce

We note at the outset that it is not our role to rule on the wisdom of the School District's actions. That is a matter that must be decided in other fora. The question before us is simply whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children. It is clear, and the parents agree, that no court has ever held that parents have a specific fundamental right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs." In fact, no such specific right can be found in the deep roots of the nation's history and tradition or implied in

the concept of ordered liberty. *See Washington v. Glucksberg,* 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Thus, whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children depends entirely upon whether the asserted right is encompassed within some broader constitutional right.

The parents next argue that the right they seek to invoke is encompassed within the fundamental due process right to "control the education and upbringing of one's children." The Supreme Court has held that the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause. *See Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). This right is commonly referred to as the *Meyer-Pierce* right because it finds its origin in two Supreme Court cases, *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

As with all constitutional rights, the right of parents to make decisions concerning the care, custody, and control of their children is not without limitations. In *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court recognized that parents' liberty interest in the custody, care, and nurture of their children resides "first" in the parents, but does not reside there *exclusively,* nor is it

"beyond regulation[by the state] in the public interest." *Id.* at 166, 64 S.Ct. 438. For example, the state "as *parens patriae* " may restrict parents' interest in the custody, care, and nurture of their children "by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Id.* (footnotes omitted). *See also Runyon v. McCrary,* 427 U.S. 160, 177, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (holding that there is no parental right to educate children in private segregated schools); *Norwood v. Harrison,* 413 U.S. 455, 461-62, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (discussing the limited scope of *Pierce*); *Wisconsin v. Yoder,* 406 U.S. 205, 239, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (White, J., concurring) (stating that the *Pierce* right "lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society"); *Pierce,* 268 U.S. at 534, 45 S.Ct. 571("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."); *Hooks v. Clark County Sch. Dist.,* 228 F.3d 1036, 1042 (9th Cir.2000) (subjecting the *Meyer-Pierce* right to reasonable regulation by the state), *cert. denied,* 532 U.S. 971, 121 S.Ct. 1602, 149 L.Ed.2d 468 (2001).

Likewise, lower courts have recognized the constitutionality of a wide variety of state actions that intrude upon the liberty interest of parents in controlling the

upbringing and education of their children. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir.2001) (upholding school district's mandatory school uniform policy); *Hooks*, 228 F.3d at 1036(upholding state statute denying speech therapy services to home-schooled children); *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C.Cir.1999) (plurality opinion) (upholding a municipality's curfew ordinance that was only applicable to minors); *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694 (10th Cir.1998) (upholding school district's full-time attendance policy); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir.1996) (upholding school district's mandatory community service program).

Finally, there are a number of cases that have upheld the constitutionality of school programs that educate children in sexuality and health. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134 (2d Cir.2003) (upholding school district's mandatory health classes against a father's claim of a violation of his fundamental rights); *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260(3d Cir.1998) (upholding school district's consensual condom distribution program); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir.1995) (upholding compulsory high school sex education assembly program); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal.App.3d 1, 124 Cal.Rptr. 68 (1975) (upholding school district's non-compulsory health and sex education program against parental challenge).

Of particular import to this case is *Brown*, in which a compulsory high school assembly presentation aimed at educating students on AIDS and other health concerns

included explicit references to sexuality. *See* 68 F.3d at 529. The *Brown* plaintiffs alleged that the compelled attendance of schoolchildren at the assembly deprived the minors and their parents of their privacy rights, substantive due process rights, and their right to an educational environment free from sexual harassment. Rejecting those claims, the First Circuit explained that,

> [t]he *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program-whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach

> their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right *to restrict the flow of information* in the public schools.

Id. at 533-34 (citations omitted) (emphasis added). We agree with and adopt the First Circuit's analysis. *Meyer, Pierce,* and their progeny "evince the principle that the state cannot prevent parents from choosing a specific educational program," but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so.

Neither *Meyer* nor *Pierce* provides support for the view that parents have a right to prevent a school from providing any kind of information-sexual or otherwise-to its students. As the *Brown* court said, "*Meyer* and *Pierce* do not encompass [the] broad-based right [the parent-plaintiffs seek] *to restrict the flow of information* in the public schools." *Id.* at 534, 45 S.Ct. 571. Although the parents are legitimately concerned with the subject of sexuality, there is no

constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District-whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.

As the First Circuit made clear in *Brown,* once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished. The constitution does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise. *See Yoder,* 406 U.S. at 205, 92 S.Ct. 1526. Perhaps the Sixth Circuit said it best when it explained, "While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.' " (citations omitted) (emphasis in original). *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 395-96 (6th Cir.2005). We endorse and adopt the Sixth Circuit's

view.[7]

The parents argue that the reasoning in *Brown* should not be followed in this case because the AIDS assembly being challenged in that case was part of the general curriculum, and there is a "curriculum exception" to the *Meyer-Pierce* right which supported that court's disposition of that case. The parents cite no case recognizing such a curriculum exception. They simply urge that we create one, and then hold that in all other respects *Meyer-Pierce* controls all matters relating to education and the educational system. That is not how the courts have analyzed the issue, *see, e.g., Blau,* and we see no reason to follow a different course.

Brown and *Blau* compel the conclusion that what *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive. The School District's design and administration of the survey in no way interfered with that right. Indeed, it was only because the parents had selected the school they did that their children were asked the questions to which the parents objected. The state action at issue simply does not fall within the *Meyer-Pierce* proscription.

In sum, we affirm that the *Meyer-Pierce* right does not extend beyond the threshold of the school door. The parents' asserted right "to control the upbringing of their children by introducing them to matters of and relating to sex in

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[7] We offer no comment as to any First Amendment issues that may arise with respect to any of these matters.

accordance with their personal and religious values and beliefs," by which they mean the right to limit what public schools or other state actors may tell their children regarding sexual matters, is not encompassed within the *Meyer-Pierce* right to control their children's upbringing and education. Accordingly, *Meyer-Pierce* provides no basis for finding a substantive due process right that could have been violated by the defendants' authorization and administration of the survey.

B. Privacy

The parents argue alternatively that the right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" is encompassed within their constitutional "right to privacy with respect to intimate decisions." The defendants argue that no such right to privacy exists independent of the substantive due process rights already analyzed, and that, in any event, any such right to privacy is not implicated by the state's actions here.

The nature of the relationship between the privacy right protecting intimate decision-making and the *Meyer-Pierce* right is far from clear. The parents suggest that "the two separate rights are inextricably intertwined in modern constitutional jurisprudence." Some courts, including the district court, have construed the two rights as one and the same when discussing a parent's privacy interest in controlling the upbringing and education of children. *See, e.g., Brown*, 68 F.3d at 532-34. Both theories find their roots in substantive due process. To the extent that the two are "inextricably intertwined," the failure of the parents to state a claim under *Meyer-Pierce* disposes of their privacy

argument. For purposes of this opinion, however, we will also analyze the privacy right separately.

Although the right to privacy provides a different source for the right the parents seek to assert than does *Meyer-Pierce,* like *Meyer-Pierce* it does not encompass that right. The Supreme Court has identified at least two constitutionally protected privacy interests: the right to control the disclosure of sensitive information and the right to "independence when making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The parents do not allege that their children were forced to disclose private information. Their argument here is only that the survey violated their own right to make important decisions regarding the manner and timing of exposing their children to sexual matters.[8]

In its earliest formulation, the right to privacy was used essentially to protect the family structure. *See Pierce,* 268 U.S. at 510, 45 S.Ct. 571(affirming family's right to be free from all but the most necessary state interference); *Meyer,* 262 U.S. at 390, 43 S.Ct. 625 (same). Courts have since found, however, that the right to privacy also protects important parental decisions such as whether to bear children, who has control over children, and other decisions related to procreative autonomy. *See Carey v. Population Servs. Int'l,* 431 U.S. 678, 684-86, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977)

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[8] No claim is asserted that either the childrens' or the parent's rights were violated because the children were compelled to disclose personal or sensitive information. Thus, we do not consider any question of compulsory disclosure of such information here.

(holding state's restrictions on sale of contraceptives an unconstitutional intrusion on the right to decide privately whether to have children); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (holding that the right to abortion falls within the right to privacy); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (affirming the equal rights of unmarried fathers to the custody of their children); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (discussing privacy right to beget children). It also encompasses a right of sexual intimacy. *See Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). We cannot overstate the significance of these rights. They symbolize the importance of our evolving understanding of the nature of our Constitution. *See* Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005). Here, however, the survey simply did not interfere with the right of the parents to make intimate decisions. Making intimate decisions and controlling the state's determination of information regarding intimate matters are two entirely different subjects. No constitutional provision prohibits the dissemination of information to children, or to adults (unless it is the Treason Clause). Thus, the right of the parents "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" is not protected by the constitutional right to privacy, at least not as that purported right is understood by the parents in this case.

C. Rational Basis Review

Governmental actions that infringe upon a fundamental right receive strict scrutiny. *See Mullins v.*

Oregon, 57 F.3d 789, 793 (9th Cir.1995). However, government actions that do not affect fundamental rights or liberty interests and do not involve suspect classifications will be upheld if it they are rationally related to a legitimate state interest. *See Vacco v. Quill,* 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997); *Doe v. Tandeske,* 361 F.3d 594, 597 (9th Cir.), *cert. denied,* --- U.S. ----, 125 S.Ct. 56, 160 L.Ed.2d 25 (2004). Because we hold that the School District's administration of the survey did not violate a fundamental right, strict scrutiny does not apply. We therefore review the parents' federal claims by applying the rational basis test. *Id.* We start from the premise that courts must be wary of "[j]udicial interposition in the operation of the public school system of the Nation." *Goss v. Lopez,* 419 U.S. 565, 578, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)); *see also Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 656-57, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *Yoder,* 406 U.S. at 235, 92 S.Ct. 1526; *Blau,* 401 F.3d at 393.

The parents offer two arguments with respect to our rational basis review. First, the complaint alleges on information and belief that there was no legitimate governmental purpose to the survey and that it was undertaken in order to benefit Seymour's academic career. The allegation is entirely speculative and conclusory in nature. No facts are offered in support of the parents' theory. Although in other circumstances we might dismiss such an allegation with leave to amend, it is apparent here that such a dismissal could not in the end aid the parents in stating a claim. Attached to the complaint is detailed information setting forth the legitimate governmental purpose of the

survey and explaining with specificity how the information obtained will be used for educational purposes and how it will ultimately benefit the School District and its children. Given the inclusion in the complaint of this specific information establishing the legitimacy of the School District's action, we must, even for purposes of a motion to dismiss, approach the application of the rational basis test from the premise that the School District had a legitimate educational purpose in undertaking the survey.

The parents also argue that the survey cannot pass review because it was not a part of the school's curriculum, and information regarding sexual matters may be conveyed only as part of a student's academic studies. The curriculum argument also fails. First, neither education itself nor the legitimate functions of a public school are limited to the curriculum. *See Blau* discussed *supra* at pp. 15075-76 and adopted herein. Such a view construes too narrowly the aims of education and fails to recognize the unique role that it plays in American society. *See Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (stating that public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring) (calling public education "a most vital civic institution for the preservation of a democratic system of government"). One need review only the Supreme Court's unanimous decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), for a reminder of the state's compelling interest in the broad ends of education, the scope of which extend far beyond "curriculum":

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493, 74 S.Ct. 686. In fine, education is not merely about teaching the basics of reading, writing, and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds. *See Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). The defendants prepared the psychological survey as an "assessment [ ] to establish a community baseline measure of children's exposure to early trauma." Protecting the mental health of children falls well within the state's broad interest in education.

Second, the psychological survey's ultimate objective was, according to an exhibit to the complaint, to improve

students' ability to learn. The exhibit reveals that the survey was intended to gauge exposure to early trauma and to assist in designing an intervention program to help the School District reduce barriers to students' ability to learn. Although the students who were questioned may or may not have "learned" anything from the survey itself and may or may not have been "taught" anything by the questions they were asked, the facilitation of their ability to absorb the education the school provides is without question a legitimate educational objective. It is indeed more directly within the school's basic educational mission, than, for example, requiring students to wear uniforms or to participate in community service, both of which some courts have held constitutional. *See Littlefield,* 268 F.3d at 291("While [p]arents may have a fundamental right in the upbringing and education of their children, this right does not cover the [p]arents' objection to a public school Uniform Policy."); *Herndon,* 89 F.3d at 176 (requiring high school students to perform community service in order to graduate does not violate parents' right to control the education of their children). *See also Swanson,* 135 F.3d at 699 ("Federal courts addressing the issue have held that parents have no right to exempt their children from certain reading programs the parents found objectionable, or from a school's community-service requirement, or from an assembly program that included sexually explicit topics.") (citations omitted).

Finally, apart from any discussion of whether the survey was intended to aid the educational process, the questioning can also be justified on the basis of an alternative state interest-namely, *parens patriae. See Prince,* 321 U.S. at 166-67, 64 S.Ct. 438. The defendants argue that the

survey was intended to gauge the mental health of the School District's students by "identify[ing] internal behaviors such as anxiety and depression and external behaviors such as aggression and verbal abuse." In this respect, the School District's interest in the mental health of its students falls well within the state's authority as *parens patriae*. As such, the School District may legitimately play a role in the care and nurture of children entrusted to them for schooling. *See id.* at 166, 64 S.Ct. 438(ruling that the state "as *parens patriae* " may supplement or even in some circumstances supplant parents' interest in the custody, care, and nurture of their children "by requiring school attendance, regulating or prohibiting the child's labor and in many other ways") (citations omitted). *See also Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (holding that a state's scheme for committing children to mental health care in state hospitals, when the child is the ward of the state, comported with due process); *Stanley*, 405 U.S. at 652, 92 S.Ct. 1208 ("We do not question the assertion that neglectful parents may be separated from their children."); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (upholding state mandatory vaccination laws, as reasonable protection of public health and safety, against a parental challenge).

Given the broad aims of education and the state's interest as *parens patriae*, there can be no question that the School District's interests in effective education and the mental health of its students are legitimate ends. *See Parham*, 442 U.S. at 603, 99 S.Ct. 2493("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.") (citation omitted); *Hunter v. Regents*, 190 F.3d 1061, 1067

(9th Cir.1999) ("California has a compelling interest in providing effective education...."). Equally so, it is reasonable for the School District to believe that the students' answers to questions posed by its employee, who was trained in evaluating mental health, would aid the establishment of a district-wide intervention program to identify and treat barriers to learning caused by exposure to childhood trauma. Accordingly, the School District's administration of the survey was rationally related to its legitimate state interest in effective education and the mental welfare of its students.

Although we reach our conclusions with little difficulty and firmly endorse the School District's authority to conduct a survey for the purposes involved here, we reiterate that we express no view on the wisdom of posing some of the particular questions asked or of conducting an inquiry into some of the particular areas surveyed by the School District. That determination is properly left to the school authorities.

III.

In summary, we hold that there is no free-standing fundamental right of parents "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" and that the asserted right is not encompassed by any other fundamental right. In doing so, we do not quarrel with the parents' right to inform and advise their children about the subject of sex as they see fit. We conclude only that the parents are possessed of no constitutional right to prevent the public schools from providing information on that subject to their students in any forum or manner they select. We further hold that a psychological survey is a reasonable

state action pursuant to legitimate educational as well as health and welfare interests of the state. Accordingly, the parent-appellants have failed to state a federal claim upon which relief may be granted. The decision of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHETLER,

Plaintiffs-Appellants,

v.

PALMDALE SCHOOL DISTRICT (PSD); MICHAEL GEISSER; ARLAND ATWOOD,

Defendants-Appellees.

No. 03-56499.
D.C. No. CV-03-00457-JVS

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
June 2, 2005 – Pasadena, California
Opinion Filed November 2, 2005.
Petition for Rehearing En Banc Filed November 23, 2005.

Filed May 17, 2006.

Before Donald P. Lay,* Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

Per Curiam Opinion

COUNSEL

Matthew D. Staver, Erik W. Stanley, Anita L. Staver, Rena M. Lindevaldsen, and Mary E. McAlister, Liberty Counsel, Longwood, FL, for the plaintiffs-appellants.

Dennis J. Walsh, Esq., Douglas Lyon, Esq., Law Offices of Dennis J. Walsh, APC, Encino, CA, for the defendants-appellees.

OPINION RE PANEL HEARING

PER CURIAM:

In light of Appellants' petition for rehearing en banc and the *amici* brief in support thereof, the panel has decided to consider whether to rehear the matter *nostra sponte.* We have unanimously determined not to do so and hereby reaffirm our decision filed on November 2, 2005. We set forth our reasons below.

Appellants are parents of schoolchildren in the Palmdale School District. Their complaint in the district

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

court alleged, *inter alia*, that the school district violated their fundamental right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" by administering a psychological assessment questionnaire containing several questions that referred to subjects of a sexual nature. The district court construed this claim as arising under the Substantive Due Process Clause of the Fourteenth Amendment and, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissed that cause of action for failure to state a claim upon which relief could be granted. *Fields v. Palmdale Sch. Dist.*, 271 F.Supp.2d 1217, 1220-23 (C.D.Cal.2003). The parents appealed the ruling but only on the basis of their substantive due process claim and their "very similar and overlapping" privacy right claim. We affirmed, *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir.2005), holding that Appellants did not possess, under the Substantive Due Process Clause or the right to privacy, a constitutional right to limit the information that public schools make available to students.[1]

Less than two weeks after we filed our opinion, Appellants replaced their California-based counsel with a national organization located in Florida. Appellants, through their new counsel, then filed a petition for rehearing en banc. The petition raises three arguments: (1) "The Complaint Should Not Have Been Dismissed," (2) "The Panel

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[1] The district court also dismissed without prejudice Appellants' state law claims. *Fields*, 271 F.Supp.2d at 1224. Appellants did not raise this issue on appeal, or otherwise appeal from the dismissal of their state claims.

Improperly Characterized the Parents' Fundamental Right," and (3) "The Panel's Decision Eviscerates Plaintiffs' Procedural Due Process Rights." We address these arguments in turn.

With respect to the first point, Appellants argue that "the panel [improperly] dismissed on a Rule 12(b)(6) motion, concluding that, other than treason, the parents have not one constitutional claim-not even due process grounded in state-recognized rights, or even the Establishment Clause." Appellants contend that they should at least be allowed to amend their complaint and present evidence before the panel considers a motion to dismiss. In an effort to support their argument, Appellants cite two cases, *Citizens for a Responsible Curriculum v. Montgomery County Public Schools,* 2005 WL 1075634 (D.Md. May 5, 2005), and *Newdow v. U.S. Congress,* 328 F.3d 466 (9th Cir.2003), in which federal courts have recognized Establishment Clause challenges to the policies of school districts.

As an initial matter, the panel did not, as the petition asserts, "dismiss [ ] on a Rule 12(b)(6) motion"; that motion was heard and granted by the district court. We merely affirmed the district court's ruling. Next, Appellants did not seek leave to amend in the district court, nor did they contend on appeal that they could have amended the complaint if permitted to do so. Thus to the extent that new counsel now complain that no amendment was permitted, their complaint is wholly without merit. Similarly, no questions relating to "state-recognized rights" were presented to us and we ruled on none. Appellants' state law claims were not before this court on appeal. The district court dismissed the state law claims without prejudice to refiling in state court, and on

appeal Appellants did not raise any issue relating to that dismissal. Nor did Appellants assert any federal due process right "grounded in state-recognized rights." The only due process right presented on appeal was the *Meyer-Pierce* substantive due process right of parents to make decisions concerning the upbringing of their children along with the closely related right to privacy. Also, no First Amendment arguments were presented on appeal and our opinion expressly reserved all First Amendment issues. Even Appellants (and their new counsel) must recognize that in light of the appeal presented to this Court neither the Free Exercise nor the Establishment Clause played any part in our holding. Any argument related to these Clauses must be presented in another case. The first argument contained in the petition for rehearing en banc is therefore entirely without merit.

Although it is difficult to discern or interpret Appellants' second argument, it appears to be that our opinion's reliance upon *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir.1995), was misplaced when we concluded that the parents' fundamental right "to make decisions concerning the care, custody and control of their children" does not override the right of public schools to determine the nature of the information they make available to their students. There can be no doubt that the Due Process Clause does protect the parents' right to control their children's upbringing. That right was recognized in two leading Supreme Court cases, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Our opinion does not in any way quarrel with or constrict the right established by those cases. However, as

the *Brown* court held and as we explained at length in our opinion, the *Meyer-Pierce* right (and the closely related privacy right) does *not* include the "right to restrict the flow of information in the public schools." *Fields*, 427 F.3d at 1206 (quoting *Brown*, 68 F.3d at 533-34). Indeed, parents "do not have a fundamental [due process] right generally to direct *how* a public school teaches their child." *Id.* (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir.2005)). That is the central holding of our opinion and no party interested in this case, including Appellants and *amici*, has cited any authority holding otherwise.

Appellants' third argument, that our opinion "eviscerates Plaintiffs' procedural due process rights," ignores the following: (1) Appellants did not raise a procedural due process claim in the district court, (2) Appellants did not raise a procedural due process claim on appeal, and (3) our opinion did not address any procedural due process claim. We need do no more here than state the obvious: We do not address issues not presented to us, and our failure to do so does not constitute an expression of views as to the merits of any such issues.

Our opinion is straightforward and dutifully applies Supreme Court and circuit court precedent. It holds simply, as other courts have held, that parents of public school children are not possessed of a constitutional right, either under the Substantive Due Process Clause or the related right to privacy, to restrict the public schools from providing information on the subject of sex. No federal court has ever found such a right in the Substantive Due Process Clause of the Constitution or in the right to privacy. To hold otherwise would misperceive the nature of the constitutional right at

issue.

Our opinion holds in essence that the Constitution does not afford parents a substantive due process or privacy right to control through the federal courts the information that public schools make available to their children. What information schools provide is a matter for the school boards, not the courts, to decide. Our holding does not, of course, consider the limitations that the First Amendment imposes upon the actions of all government agencies, including school boards. That issue is not before us. Nor does our decision address any question of state law, or consider any issues that might be raised by the parents in state court. Nor, as we stated unequivocally, does our opinion address the propriety of the school allowing the survey to be circulated. Finally, our decision does not affect the rights of parents to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation. That is, of course, beyond the scope of the present proceedings. We consider on this appeal only the issues presented by the parties initially in the district court and then to us when we heard the matter as a three-judge panel. We do not consider on rehearing new issues previously not raised, briefed or argued. *See, e.g., Squaw Valley Dev. Co. v. Goldberg*, 395 F.3d 1062, 1064 (9th Cir.2005).

Accordingly, upon full review, we reaffirm our opinion with two amendments to the text. To make our holding more precise we delete the sentence appearing at lines 9-10 of page 15076 of the Slip Opinion ("In sum, we affirm that the *Meyer-Pierce* right does not extend beyond the threshold of the school door.") and substitute therefor the following:"In sum, we affirm that the *Meyer-Pierce* due

process right of parents to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions, or to collect monetary damages based on the information the schools provide." To remove an ambiguity and to be more specific, we delete the portion of our opinion that begins "Here, however, the survey ... at line 14 of page 15078 of the Slip Opinion and ends ... by the parents in this case." at line 25 of the same page, and substitute the following language:

Here, however, the survey simply did not interfere with the right of the parents to make intimate decisions. Indeed, before the survey was conducted the parents were notified and their consent was sought. None objected and all but one signed and returned the consent form. Making intimate decisions and controlling the state's dissemination of information regarding intimate matters are two entirely different subjects. With respect to the latter, no information of a private nature-indeed no information at all-regarding any individuals was disseminated. Moreover, no constitutional provision prohibits the dissemination of general information on subjects of public interest to children or to adults (unless it is the Establishment or the Treason Clause). Thus, the right of the parents "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs"-the right to privacy here asserted-does not entitle them to prohibit public schools from providing students with information that the schools deem to be educationally appropriate.

The Opinion filed November 2, 2005, is REAFFIRMED with the two amendments contained herein.

APPENDIX C

UNITED STATES DISTRICT COURT, C.D. CALIFORNIA, SOUTHERN DIVISION.

James FIELDS; Tammany Fields; Stuart Haberman; Kathleen Haberman; Robert Hoaglin; Kathie Hoaglin; and Vanessa Shetler,

Plaintiffs,

v.

PALMDALE SCHOOL DISTRICT; Michael Geisser; Arland Atwood; Kristi Seymour; and Does 1 through 10, inclusive,

Defendants.

No. SACV03457JVS(SHSX).

July 18, 2003.

ORDER RE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT [FRCP 12(b)(6)]

SELNA, District J.

The Plaintiffs[1] in this case, all of whom are parents of

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[1] Plaintiffs are James and Tammany Fields, the natural and custodial parents of a minor identified in the Complaint as J.E.F.; Stuart and Kathleen Haberman, the natural and custodial parents of a minor identified as T.H.; Robert and

public school children (collectively the "Parents"), brought suit against Defendants Palmdale School District, Michael Geisser, Arland Atwood, and Kristi Seymour (collectively the "District") based on the District's distribution of a sexually-explicit survey to their children at Mesquite Elementary School ("Mesquite") in January of 2002. The case is now before this Court on the District's Motion to dismiss the Parents' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court, finding a "lack of a cognizable legal theory" on the Parents' federal claims, Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.1988), dismisses the federal causes of action for failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6), and further dismisses the Parents' state law causes of action on jurisdictional grounds. The Motion is granted.

I. Background

The Complaint alleges the following facts, which the Court assumes are true for the purposes of this Motion. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996). In late 2001, Defendant Kristi Seymour ("Seymour"), who was volunteering as a children's mental health counselor at Mesquite, approached her supervisors at the District about administering a psychological assessment questionnaire (the "Survey") to first, third, and fifth grade students. Compl. ¶¶ 20-22. Defendant Michael Geisser ("Geisser"), the District's Director of Psychological Services, and Defendant Arland

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Kathie Hoaglin, the natural and custodial parents of a minor identified as B.H.; and Vanessa Shelter, the natural and custodial mother of a minor identified as A.J.D.C.

Atwood ("Atwood"), the Principal of Mesquite, gave Seymour permission to distribute the Survey to Mesquite students at those grade levels. Id. at ¶¶ 6, 7, 23.

Accordingly, in December of 2001, Seymour sent letters to parents of Mesquite students, requesting consent regarding their children's participation in the Survey.[2] Id. at ¶ 27; Ex. D. In particular, the letter asked for the parents' "support in participating in a district wide [*sic*] study of our first, third and fifth grade children," and stated that the study was "part of a collaborative effort with The California School of Professional Psychology ..., [the] Children's Bureau of Southern California[,] and the Palmdale School District."Id. at ¶ 29; Ex. D. The letter further indicated that the goal of the Survey was to "establish a community baseline measure of children's exposure to early trauma (for example, violence)." Id. at ¶ 27; Ex. D. Although the letter and accompanying consent form warned that "answering questions may make [a] child feel uncomfortable" and provided the parents with options to obtain further information regarding the Survey and to refuse to have their children participate, the content of the Survey-in particular, the sexual nature of some of the questions-was nowhere disclosed. Id. at ¶ 30; Ex. D.

The Parents, whose children were third or fifth grade students at Mesquite at all times relevant to this case, received Seymour's letter and consent form in December 2001. Id. at ¶¶ 13, 27. At least one of the Parents subsequently contacted Seymour directly, per the consent form's instructions, to

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[2] Seymour sent these letters using names and addresses of Mesquite students that were provided to her by Geisser and Atwood. Compl. ¶ 26.

obtain further information regarding the Survey's content. Id. at ¶ 31; Ex. D. During that communication, Seymour did not disclose the sexually-explicit nature of some of the questions that would be asked of the students. Id. at ¶ 31. In fact, prior to the administration of the Survey, the Parents were never informed of the fact that their children would be exposed to questions relating to sex and sexual activity. Id. at ¶ 32. Had they known the true nature of the Survey, none of the Parents would have consented to their children's involvement. Id. at ¶ 33. However, in reliance on the District's representations, all of the Parents except Stuart and Kathleen Haberman signed and returned Seymour's consent form, thereby agreeing to their children's participation in the Survey. Id. at ¶¶ 34-35.

In January of 2002, Seymour administered the Survey to Mesquite students during regular school hours and on school grounds.[3] Id. at ¶ 36. The children followed Seymour's instructions to read and respond to all questions. *Id.* at ¶ 37. As a consequence, they were exposed to questions that were sexually explicit, including questions that asked them to rate the frequency of the following activities on a scale from "never" to "almost all the time":

> *8. Touching my private parts too much*
>
> ...
>
> *17. Thinking about having sex*

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[3] The Survey was administered to Stuart and Kathleen Haberman's child as well as to the other children, in spite of the fact that the Habermans never returned a signed consent form or otherwise consented to their child's participation. Compl. ¶¶ 35-36.

...

22. Thinking about touching other people's private parts

23. Thinking about sex when I don't want to

...

26. Washing myself because I feel dirty on the inside

...

34. Not trusting people because they might want sex.

...

40. Getting scared or upset when I think about sex

...

44. Having sex feelings in my body

...

47. Can't stop thinking about sex

...

54. Getting upset when people talk about sex

Id. at Ex. C.

The Parents, believing such question to be "patently inappropriate and highly offensive considering the age of the children to whom the survey was targeted," presented a tort claim to the Palmdale School Board (the "Board") on May 30, 2002, after having been informed of the nature of the Survey by their children. Id. at Ex. A. Following the Board's rejection of the Parents' claim by letter dated July 1, 2002, id. at Ex. B, the Parents filed the instant action.

II. Discussion

The Parents' Complaint asserts causes of action for: (1) Violations of their federal constitutional right to privacy; (2) Violations of their state constitutional right to privacy,

guaranteed by Article 1, Section 1 of the California Constitution and the laws enacted thereunder; (3) Deprivation of their civil rights pursuant to 42 U.S.C. § 1983 ("Section 1983"); and (4) Negligence. For purposes of this Motion, the federal claims are addressed first.

A. Substantive Due Process Claim [4]

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The substantive component of this Due

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[4] While the Parents characterize their first cause of action as a "right to privacy" claim and refer, in their moving papers, to the "zone of privacy" that the Supreme Court has recognized in the "penumbras" of the First, Third, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments, see Griswold v. Connecticut, 381 U.S. 479, 484-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Court finds that all of the Parents' arguments concerning the claim are grounded in the Fourteenth Amendment's Substantive Due Process Clause. Other than citing generally to privacy cases outside of the Fourteenth Amendment's scope, the Parents do not connect their asserted interest in "control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs," Compl. ¶ 42, to the First, Third, Fourth, Fifth, Ninth, or Tenth Amendments. Their right to privacy claim is thus recharacterized as a substantive due process claim for purposes of this discussion.

Process Clause not only safeguards one's "life, liberty, or property," but also protects against government interference with certain fundamental liberty interests in situations where the infringement is not narrowly tailored to serve a compelling government interest. Reno v. Flores, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). In this case, the Parents assert that just such a fundamental right was violated by the District's actions. The issue before the Court is whether the Parents' asserted liberty interest in "control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs, pursuant to the Constitutionally protected right to privacy," qualifies as a fundamental right for purposes of the Fourteenth Amendment. Compl. ¶ 42.[5] The Court finds that it does not, and thus concludes that the Parents have failed to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6).

The parameters of the "liberty" protected by the Substantive Due Process Clause cannot be defined with

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[5] The Parents' liberty interest is described elsewhere in the Complaint as "[t]he right of the parent or guardian to raise his/her child in a manner appropriate to the child's development and in accordance with the parent's beliefs" and as "the right to control the education of their children such that they, and not defendants, should have exercised sole power and authority to determine whether, and if so when, their children should be exposed to subject matter similar to that set forth in the Survey." Compl. ¶¶ 39, 50.

precision.[6] The Supreme Court has held that it includes the right to bodily integrity, Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); the right to engage in private consensual homosexual conduct, Lawrence v. Texas, 539U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); the right to marry, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the right to marital privacy, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); the right to use contraception, id.; Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); the right to abortion, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); the right to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); the right to make decisions regarding the care, custody, and control of one's children, Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); and the right to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923);

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[6] . See Lawrence v. Texas, 539 U.S. 558, ----, 123 S.Ct. 2472, 2483-84, 156 L.Ed.2d 508 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.... As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).[7] It is this last right with which this case is concerned.

The Parents argue that their right to control the upbringing of their children, a fundamental right guaranteed under the Fourteenth Amendment, was violated when the District exposed their children to sexually-explicit information without the Parents' informed consent. There is no dispute that the right of "parents and guardians to direct the upbringing and education of children under their control" is a fundamental right for purposes of the Fourteenth Amendment. Pierce, 268 U.S. at 534-35, 45 S.Ct. 571; see also Troxel, 530 U.S. at 65, 120 S.Ct. 2054 (plurality opinion) ("the interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests"); Meyer, 262 U.S. at 399, 43 S.Ct. 625. However, whether the liberty interest asserted by the Parents here can be recognized as a violation of the right to "direct the upbringing and education" of one's children is an open question in the substantive due process jurisprudence of the

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[7] Many of these fundamental rights, especially those relating to marital activities and family relationships, have been classified by the Supreme Court under a broader "right to privacy" that is implicit in the Fourteenth Amendment as well as other Amendments to the United States Constitution. See, e.g., Griswold, 381 U.S. at 484-86, 85 S.Ct. 1678; Roe, 410 U.S. at 153, 93 S.Ct. 705. As stated above, the Parents base their federal constitutional claim on this right to privacy. See supra note 4.

Supreme Court.[8]

In deciding whether to expand the scope of substantive due process to include the liberty interest asserted by the Parents, this Court is mindful of the fact that the Supreme Court has cautioned courts to be "reluctant to expand the concept of substantive due process[,] because guideposts for responsible decisionmaking in this unchartered

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[8] FN8. At least one California court has determined that parents have no "exclusive constitutional right," under the Federal or the California Constitutions, "to teach their children about family life and sexual matters in their own homes." Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal.App.3d 1, 32-33, 124 Cal.Rptr. 68 (1975) (holding that a county's adoption of a noncompulsory "family life and sex education" curriculum did not violate the parents' or students' federal substantive due process rights). Although the District relied heavily on the case in its moving papers, the Court finds that the right asserted here is different, although only subtly so. The Parents do not contend that they alone have the right to teach their children about sex or sexual activity, such that any instruction on those subjects at Mesquite would have violated their right to substantive due process. Rather, they argue that they have the right to control *when* their children are exposed to those topics, such that instruction without their informed consent violated the Fourteenth Amendment. The Parents' asserted liberty interest thus concerns the timing of the instruction more than its substance, in contrast to the interest asserted by the parents and students in Citizens for Parental Rights.

area are scarce and open-ended." Collins v. Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Extending the reach of the Substantive Due Process Clause to a previously unprotected liberty interest not only potentially "place[s] the matter outside the arena of public debate and legislative action," Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), but also contains an inherent risk that the policy preferences of the judiciary will unduly influence constitutional law, Moore v. East Cleveland, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion).

Given these concerns, the Supreme Court has repeatedly emphasized two principles for substantive due process analysis. Glucksberg, 521 U.S. at 720-21, 117 S.Ct. 2258. First, the Court has required a "careful description" of the asserted fundamental right. Flores, 507 U.S. at 302, 113 S.Ct. 1439. Second, the Court has stated that the Due Process Clause protects, above all, those fundamental rights that are objectively "rooted in the traditions and conscience of our people," Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934), or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

This Court finds that the Parents' asserted liberty interest in "control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" is drawn narrowly enough to satisfy the first principle stated above. The Court nonetheless concludes that the interest is not "deeply rooted in this Nation's history and tradition," Moore, 431 U.S. at 503, 97 S.Ct. 1932 (plurality

opinion), such that "neither liberty nor justice would exist if [it] were sacrificed," Palko, 302 U.S. at 326, 58 S.Ct. 149. As such, the Court finds that the liberty interest asserted by the Parents is not fundamental in nature and not protected under the Substantive Due Process Clause of the Fourteenth Amendment.

The Court notes, in this regard, that the liberty interest asserted by the Parents in this case is distinguishable from the interests that were recognized by the Supreme Court in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). As the First Circuit explained in Brown v. Hot. Sexy and Safer Productions, Inc., these seminal Supreme Court's cases regarding the fundamental right to direct the education and upbringing of one's children "evince the principle that the state cannot prevent parents from choosing a specific educational program-whether it be religious instruction at a private school or instruction in a foreign language." Brown v. Hot. Sexy and Safer Productions, Inc., 68 F.3d 525, 533 (1st Cir.1995). They do not, however, give parents a fundamental right to control a public school district's curriculum simply because they have chosen to send their children to public school. Id. at 533-34 ("The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children.").

In Brown, the First Circuit held that a compulsory, sexually-explicit AIDS awareness assembly did not violate high school students' substantive due process rights, based in part on the fact that "the rights of parents as described by

Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools." Brown, 68 F.3d at 534. This Court finds the First Circuit's reasoning persuasive, and concludes with respect to this case that the right established in Meyer and Pierce to direct the education of one's children does not give parents the right to "control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs," contrary to the Parents' assertions. Compl. ¶ 42. Accordingly, the District's Motion to dismiss the Parents' first cause of action for failure to state a claim is granted. Fed.R.Civ.P. 12(b)(6).

B. Federal Civil Rights Claim

In light of the Court's finding that the Parents' asserted liberty interest is not protected by the Substantive Due Process Clause of the Fourteenth Amendment, the Court dismisses the Parents' third cause of action as well, on the grounds that it fails to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). In order state a claim under Section 1983, the Parents must prove that the District (i) violated a "clearly established" statutory or constitutional right, Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); and (ii) was acting "under color of state law" when it committed the alleged violation, West v. Atkins, 487 U.S. 42, 49-50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) ("a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law"). See also Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Because the Court finds no constitutional violation as a matter of substantive due process, the Parents

cannot make the first showing required to establish a prima facie case under Section 1983, and their claim necessarily fails. The District's Motion to dismiss the Parents' third cause of action is thus granted. Fed.R.Civ.P. 12(b)(6).

C. State-Law Causes of Action

Having dismissed all claims over which the Court has original subject matter jurisdiction, the Court declines to exercise supplemental jurisdiction over the Parents' remaining claims, both of which are based on California law and more appropriately adjudicated in California courts. 28 U.S.C. § 1367(c)(3); see also Ove v. Gwinn, 264 F.3d 817, 826 (9th Cir.2001). These claims are accordingly dismissed without prejudice.

III. Conclusion

Based on the above, IT IS HEREBY ORDERED that:

(1) The Parents' first and third causes of action are DISMISSED for failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6); and

(2) The Parents' second and fourth causes of action are DISMISSED without prejudice on jurisdictional grounds, 28 U.S.C. § 1367(c)(3).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHETLER, Plaintiffs-Appellants v. PALMDALE SCHOOL DISTRICT (PSD); MICHAEL GEISSER; ARLAND ATWOOD, Defendants-Appellees.	) No. 03-56499) D.C. No CV-03-00457-JVS) Central District of) California, Santa Ana))) ORDER))))))))))	

Filed May 30, 2006

Before: LAY,* REINHARDT, and THOMAS, Circuit Judges.

Judges Reinhardt and Thomas voted to deny the

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit sitting by designation.

petition for rehearing en banc and Judge Lay recommended denial. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

APPENDIX E

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend IX

APPENDIX G

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under

any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend XIV

APPENDIX H

CALIFORNIA EDUCATION CODE
Title 2. Elementary and Secondary Education
Division 4. Instruction and Services
Part 28. General Instructional Programs
Chapter 1.5. Parental Involvement
Article 1. General Provisions

Section 51101.

(a) Except as provided in subdivision (c), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher.

Although volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a bi-annual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite.

The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the

education of their own child or the total school program.

(c) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

Cal. Educ. Code § 51101 (West 2001)

APPENDIX I

CALIFORNIA EDUCATION CODE
Title 2. Elementary and Secondary Education
Division 4. Instruction and Services
Part 28. General Instructional Programs
Chapter 4. Prohibited Instruction
Article 2. Prohibited Materials

Section 51513.

No test, questionnaire, survey, or examination containing any questions about the pupil's personal beliefs or practices in sex, family life, morality, and religion, or any questions about the pupil's parents' or guardians' beliefs and practices in sex, family life, morality, and religion, shall be administered to any pupil in kindergarten or grades 1 to 12, inclusive, unless the parent or guardian of the pupil is notified in writing that this test, questionnaire, survey, or examination is to be administered and the parent or guardian of the pupil gives written permission for the pupil to take this test, questionnaire, survey, or examination.

Ca. Educ. Code § 51513 (West 2001)

APPENDIX J

CALIFORNIA EDUCATION CODE
Title 2. Elementary and Secondary Education
Division 4. Instruction and Services
Part 28. General Instructional Programs
Chapter 4. Prohibited Instruction
Article 6. Sex Education Courses

Section 51550.

No governing board of a public elementary or secondary school may require pupils to attend any class in which human reproductive organs and their functions and processes are described, illustrated or discussed, whether such class be part of a course designated "sex education" or "family life education" or by some similar term, or part of any other course which pupils are required to attend.

If classes are offered in public elementary and secondary schools in which human reproductive organs and their functions and processes are described, illustrated or discussed, the parent or guardian of each pupil enrolled in such class shall first be notified in writing of the class. Sending the required notice through the regular United States mail, or any other method which such local school district commonly uses to communicate individually in writing to all parents, meets the notification requirements of this paragraph.

Opportunity shall be provided to each parent or guardian to request in writing that his child not attend the class. Such requests shall be valid for the school year in which they are submitted but may be withdrawn by the parent or guardian at any time. No child may attend a class if a request that he not

attend the class has been received by the school.

Any written or audiovisual material to be used in a class in which human reproductive organs and their functions and processes are described, illustrated, or discussed shall be available for inspection by the parent or guardian at reasonable times and places prior to the holding of a course which includes such classes. The parent or guardian shall be notified in writing of his opportunity to inspect and review such materials.

This section shall not apply to description or illustration of human reproductive organs which may appear in a textbook, adopted pursuant to law, on physiology, biology, zoology, general science, personal hygiene, or health.

Nothing in this section shall be construed as encouraging the description, illustration, or discussion of human reproductive organs and their functions and processes in the public elementary and secondary schools.

The certification document of any person charged with the responsibility of making any instructional material available for inspection under this section or who is charged with the responsibility of notifying a parent or guardian of any class conducted within the purview of this section, and who knowingly and willfully fails to make such instructional material available for inspection or to notify such parent or guardian, may be revoked or suspended because of such act. The certification document of any person who knowingly and willfully requires a pupil to attend a class within the purview of this section when a request that the pupil not attend has been received from the parent or guardian may be revoked or

suspended because of such act.

Cal. Educ. Code § 51550 (West 2001)

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 06-300

In The
Supreme Court of the United States

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; KATHLEEN HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHELTER,

Petitioners,

v.

PALMDALE SCHOOL DISTRICT; MICHAEL GEISSER; ARLAND ATWOOD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Contrary to Petitioners' assertion, this case does not present a public policy question of exceptional importance. Petitioners maintain that the Ninth Circuit' "stepped into uncharted territory" when it determined that parents of public school children have no *free-standing* fundamental right to "exclusive" control over the introduction of sex-related information to their children. Petitioners are incorrect. Petitioners misconstrue Supreme Court precedent in an attempt to manufacture a "fundamental right" where no such right exists. The Ninth Circuit's opinion is wholly in accord with the line of Supreme Court cases addressing the right of parents to control the education and upbringing of their children. The Ninth Circuit's opinion fits squarely within the legal framework of the cases addressing similar issues. For that reason, the Petition for Writ of Certiorari should be denied.

Palmdale School District ("School District"), working in collaboration with Michael Geisser, its Director of Psychological Services, and the California School of Professional Psychology, administered a psychological assessment questionnaire to students of Mesquite Elementary in 2001. The students to whom the survey was administered ranged in age from seven to ten. The purpose and goal of the study was to "establish a community baseline measure of children's exposure to early trauma (for example, violence)," and "identify internal behaviors such as anxiety and depression and external behaviors such as aggression and verbal abuse." This information would then be used by the School District to design an intervention program to help children reduce barriers to learning. Effectively, the survey served as a tool to assist in developing mechanisms

by which students' educational/learning experiences could be improved.

Before the survey was administered, parental consent forms were sent home with the students, seeking written permission from parents to allow their children to sit for the survey. The consent form informed parents of the questionnaire's nature and purpose. The letter assured parents that the "study is 100% confidential and at no time will the information gathered be used to identify your child," and that only four people would have access to the study's information which would be "locked in storage and then destroyed after a period of five years."

The letter did not explicitly state that a few questions involved sexual topics, although it did specify that the survey questions were about "early trauma (for example, violence)" and there was a warning that "answering questions may make [the] child feel uncomfortable." Parents were given the name and contact information of the person in charge of the survey if they had any questions. They were also informed, "You may refuse to have your child participate or withdraw from this study at any time without any penalty or loss of services to which your child is entitled."

Upon approval by the School District, the survey was administered to students during school hours. Kristi Seymour ("Seymour"), a graduate psychology student and volunteer counselor at the school, sat with the students while the survey was administered. The survey consisted of three, twenty-minute questionnaires (i.e., seventy-nine questions) testing the frequency with which the students experienced a variety of sensations, emotions, thoughts, and experiences.

Several parents, after discussing the survey with their children, deemed nine of the questions to be "patently inappropriate and highly offensive considering the age of the children to whom the survey was targeted."[1]

Those parents then brought suit in the United States District Court, Central District of California alleging that "(1) Violations of their federal constitutional right to privacy; (2) Violations of their state constitutional right to privacy, guaranteed by Article 1, Section 1 of the California Constitution and the laws enacted thereunder; (3) Deprivation of their civil rights pursuant to 42 U.S.C. § 1983 ("Section 1983"); and (4) negligence." *Fields v. Palmdale Sch. Dist.*, 271 F.Supp.2d 1217, 1220 (C.D. Cal. July 18, 2003).

In their complaint, parents asserted "the right to control the education of their children such that they, and not defendants, should have exercised sole power and authority to determine whether, and if so when, their children should be exposed to subject matter similar to that set forth in the Survey." *Id.* at 1221, fn. 5.[2] Thus,

---

[1] The questions involving sexual references are: 8. Touching my private parts too much; 17. Thinking about having sex; 22. Thinking about touching other people's private parts; 23. Thinking about sex when I don't want to; 26. Washing myself because I feel dirty on the inside; 34. Not trusting people because they might want sex; 40. Getting scared or upset when I think about sex; 44. Having sex feelings in my body; 47. Can't stop thinking about sex; and 54. Getting upset when people talk about sex.

[2] Parents' complaint cited generally to privacy cases outside of the Fourteenth Amendment's scope, but did not connect their asserted interest in "control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs," to the First, Third, Fourth, Fifth, Ninth, or Tenth Amendments. *Id.* at 1220, fn. 4.

parents "do not contend that they ***alone*** have the right to teach their children about sex or sexual activity, such that any instruction on those subjects at Mesquite would have violated their right to substantive due process. Rather, they argue that they have the right to control *when* their children are exposed to those topics, such that instruction without their informed consent violated the Fourteenth Amendment. The parents' asserted liberty interest thus concerns the ***timing*** of the instruction, more than its substance . . . " *Id.* at 1222, fn. 8.

In response to the parents' complaint, the School District filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

In its ruling on the motion, the District Court noted that "all of the Parents' arguments concerning the claim are grounded in the Fourteenth Amendment's Substantive Due Process Clause." *Id.* The District Court also noted that the Supreme Court has cautioned lower courts to refrain from extending the reach of the Substantive Due Process Clause to "previously unprotected liberty interest[s]." *Id.* at 1222 [quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)].

With these parameters in mind, the District Court described the issue presented as "whether the Parents' asserted liberty interest in 'control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs, pursuant to the Constitutionally protected right to privacy,' qualifies as a fundamental right for purposes of the Fourteenth Amendment." According to the District Court, "the Supreme Court has repeatedly emphasized two principles for substantive due

process analysis. [Citation.] First, the Court has required a 'careful description' of the asserted fundamental right. [Citation.] Second, the Court has stated that the Due Process Clause protects, above all, those fundamental rights that are objectively 'rooted in the traditions and conscience of our people' [citation], or 'implicit in the concept of ordered liberty [citation].'" *Id.* at 1222.

In analyzing the parents' asserted liberty interest (i.e., to control *when* their children are exposed to topics relating to sex) in this case, the District Court found the fundamental right was "drawn narrowly enough to satisfy the first principle stated above." *Id.* However, the District Court concluded the parents' interest was not "'deeply rooted in this Nation's history and tradition,' [citation], such that "'neither liberty nor justice would exist if [it] were sacrificed,' [citation]." As such, the District Court held "that the liberty interest asserted by the parents is not fundamental in nature and not protected under the Substantive Due Process Clause of the Fourteenth Amendment." *Id.* at 1223.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. The Ninth Circuit framed the issue as follows: "The question before us is simply whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children. It is clear, and the parents agree, that no court has ever held that parents have a specific fundamental right 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.'" *Fields v. Palmdale Sch. Dist. (PSD)*, 427 F.3d 1197, 1203-1204 (9th Cir. 2005).

"Thus, whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children depends entirely upon whether the asserted right is encompassed within some broader constitutional right." *Id.* at 1204. The parents therefore argued that the right they seek to invoke is encompassed within "the fundamental due process right to make decisions concerning the care, custody, and control of their children."[3]

The Ninth Circuit concluded, "The parents' asserted right 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs,' by which they mean the right to limit what public schools or other state actors may tell their children regarding sexual matters, is not encompassed within the *Meyer-Pierce* right to control their children's upbringing and education." *Id.* at 1207.

The Court of Appeals explained:

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by

[3] This right is commonly referred to as the *Meyer-Pierce* right because it finds its origin in two Supreme Court cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

> *Meyer* and *Pierce* do not encompass a broad-based right *to restrict the flow of information* in the public schools. . . . *Meyer*, *Pierce*, and their progeny "evince the principle that the state cannot prevent parents from choosing a specific educational program," but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. *Id.* at 1205-1206.

The parents argued alternatively that the right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" is encompassed within their constitutional "right to privacy with respect to intimate decisions." *Id.* at 1207. The Ninth Circuit concluded:

> Although the right to privacy provides a different source for the right the parents seek to assert than does *Meyer-Pierce,* like *Meyer-Pierce* it does not encompass that right. The Supreme Court has identified at least two constitutionally protected privacy interests: the right to control the disclosure of sensitive information and the right to "independence when making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977). The parents do not allege that their children were forced to disclose private information. Their argument here is only that the survey violated their own right to make important decisions regarding the manner and timing of exposing their children to sexual matters. *Id.* at 1207.

While recognizing "the significance of these rights," the Ninth Circuit noted "the survey simply did not interfere with the right of the parents to make intimate

decisions. Indeed, before the survey was conducted the parents were notified and their consent was sought. None objected and all but one signed and returned the consent form. Making intimate decisions and controlling the state's dissemination of information regarding intimate matters are two entirely different subjects. With respect to the latter, no information of a private nature – indeed no information at all – regarding any individuals was disseminated." *Fields v. Palmdale Sch. Dist. (PSD)* 447 F.3d 1187, 1191 (9th Cir. 2006). "[T]he right of the parents 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs' – the right to privacy here asserted – does not entitle them to prohibit public schools from providing students with information that the schools deem to be educationally appropriate." *Id.*

Having determined that the School District's use of the psychological survey in question did not impinge upon parents' fundamental due process rights, the Ninth Circuit concluded that the survey constituted "reasonable state action pursuant to legitimate educational, as well as health and welfare, interests of the state." *Id.* at 1211.

In response to parents' petition for rehearing en banc and the *amici* brief in support thereof, the Court of Appeal's panel decided to consider whether to rehear the matter *nostra sponte*, but unanimously determined not to do so and thereafter reaffirmed its decision filed on November 2, 2005. *Fields v. Palmdale Sch. Dist. (PSD)*, supra, 447 F.3d 1187.

REASONS FOR DENYING THE WRIT

I. A COMMENT ON THE TENOR OF PARENTS' PETITION FOR WRIT OF CERTIORARI.

Preliminarily, the School District notes that Petitioners seek to pique the Court's interest in this case with misleading rhetoric and overstatements about the impact of decision of the Court of Appeals. For example, Petitioners repeatedly assert the School District "tricked them" into consenting to a "sexually-explicit" survey "shocked and shamed the [Petitioner's] children and robbed them of their innocence" by introducing the children "to subjects of masturbation, sexual imagery, lust, sex, sexual opportunism, sexual anxiety, sex drive, sexual compulsions and sexual assault . . . " (Petition, pp. 2, 4, 26-27) Petitioners also proclaim, "The Ninth Circuit's decision castrates Supreme Court precedent. It is an assault on parental authority." (Petition, p. 15) They characterize the Ninth Circuit's opinion as "concluding that parents' fundamental interests can ***never*** overcome the interests of public schools in educating their children free from parental interference." (Id. at p. 8)

Petitioners' statements exaggerate the factual underpinnings of the case, as well as the breadth of the Court of Appeals' decision. This type of hyperbole is seldom useful to the Court in its evaluation of a petition for writ of certiorari. In fact, Petitioners' resort to this type of embellishment is a clear sign that the issues presented for review are lacking in the qualities normally associated with certiorari.

II. THE COURT OF APPEALS' DECISION IN THIS CASE DOES NOT CONFLICT WITH PREVIOUS PRECEDENT OF THIS COURT.

In their petition, the parents assert the Ninth Circuit's "unprecedented" decision is "so broad that it eviscerates parental rights recognized by this Court." (Petition, p. 7) They urge the Court to grant certiorari to ensure "that public school officials [will not] *replace* the parents' prerogatives on when and how their children are introduced to matters concerning sex and sexuality." (Id. at p. 6)

Petitioners are clearly wrong in asserting that the Ninth Circuit's decision is "unprecedented." To the contrary, the Ninth Circuit followed established precedent and was highly cautious not to create new rights and interests where none existed. As noted by the District Court:

> In deciding whether to expand the scope of substantive due process to include the liberty interest asserted by the Parents, this Court is mindful of the fact that the Supreme Court has cautioned courts to be "reluctant to expand the concept of substantive due process[,] because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). Extending the reach of the Substantive Due Process Clause to a previously unprotected liberty interest not only potentially "place[s] the matter outside the arena of public debate and legislative action," *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997), but also contains an inherent risk that the policy preferences of the judiciary will unduly influence constitutional law, *Moore v. East Cleveland,* 431 U.S. 494, 502 (1977) (plurality

opinion). *Fields v. Palmdale Sch. Dist.*, supra, 271 F.Supp.2d at 1222.

The Ninth Circuit was likewise mindful of previous precedent of this Court on the issue of parental rights:

> There can be no doubt that the Due Process Clause does protect the parents' right to control their children's upbringing. That right was recognized in two leading Supreme Court cases, *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Our opinion does not in any way quarrel with or constrict the right established by those cases. However, . . . as we explained at length in our opinion, the *Meyer-Pierce* right (and the closely related privacy right) does *not* include the "right to restrict the flow of information in the public schools." *Fields,* 427 F.3d at 1206 (quoting *Brown v. Hot, Sexy & Safer Prods., Inc.),* 68 F.3d [525,] 533-34 [(1st Cir. 1995)]). Indeed, parents "do not have a fundamental [due process] right generally to direct *how* a public school teaches their child." *Id.* (quoting *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 395 (6th Cir. 2005)). That is the central holding of our opinion and no party interested in this case, including Appellants and *amici,* has cited any authority holding otherwise. *Fields v. Palmdale Sch. Dist.*, supra, 447 F.3d at 1189-1190.

A. No Case in the *Meyer-Pierce* Line Has Recognized a Parental Right of Exclusive Control Over "Sex-Related Information" to Which Children Are Exposed in Public Schools.

Petitioners, in effect, want to extend the recognized right of parents to control the upbringing of their children to include exclusive control over sex-related information to which children are exposed in public schools. The Court of Appeals' determination not to extend this parental right is consistent with the precedent of this Court.

In addition to this Court's decisions in *Collins v. Harker Heights*, *Washington v. Glucksberg* and *Moore v. East Cleveland* [cited by the District Court in this case], Justice Stevens in *Troxel v. Granville*, 530 U.S. 57 (2000), cautioned in his dissenting opinion against utilizing the "broad language about the scope of parents' due process rights with respect to their children" found in *Pierce* beyond the factual context of the case. *Id.* at 86, fn. 7.

Justice Scalia voiced similar concerns in *Troxel* when he commented that:

> The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context. *Id.* at 92.

Justice Scalia warned the nebulous and uncertain nature of the *Meyer-Pierce* line of cases means that "courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Id.* at 95-96.

Justice Souter's concurring opinion also noted: "Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child. . . ." *Id.* at 78.

Furthermore, Petitioner's mischaracterize the Court's holding in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as requiring deference to parental rights on this issue. (Petition, pp. 9-10) Petitioners argue that in *Yoder* "this Court again acknowledged the fundamental interest that parents have in directing the upbringing of their children and ruled that the State's interest in public education cannot infringe upon those rights. . . ." (Petition, p. 9).

In *Yoder*, the Court's inquiry was circumscribed to an analysis of compulsory secondary education as it related to the "fundamental mode of life mandated by the Amish religion." *Yoder*, 406 U.S. at 217. The precise question before the Court was whether Wisconsin's compulsory-attendance law conflicted with the fundamental tenants of the Amish religion. In determining that the compulsory-attendance law carried with it the "objective danger" of undermining the group's religious values, the Court noted that "the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's

requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219.

The holding in *Yoder* has never been read to mean that parents are vested with a veto right to determine if, when, and how their children will be exposed to information related to sex in public schools. As the Court explained in *Runyon v. McCrary*, 427 U.S. 160, 177 (1976), the Court in *Yoder* "stressed the limited scope of *Pierce*," and noted that parents do not have the right to supplant state educational requirements with their own idiosyncratic views regarding education. A state may formulate educational standards, but it cannot force children to attend public schools. *Id.* "Indeed the Court in Pierce expressly acknowledged 'the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . '" *Id.* at 178-179 [quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534].

In sum, no case in the *Meyer-Pierce* line has recognized a parental right of exclusive control over "sex-related information" to which children are exposed in public schools. The Ninth Circuit correctly determined that the recognition of such a right in this case would have run afoul of established precedent of this Court. Such an alleged right is not deeply rooted in the "nation's history and tradition or implied in the concept of ordered liberty." *Fields*, 427 F.3d at 1204. The Ninth Circuit's decision, therefore, is wholly in accord with the Supreme Court's directive in *Troxel* that Court's must be circumspect and cautious in their analysis in these types of cases.

B. Neither *Troxel* Nor The *Meyer-Pierce* Line of Cases Require the Judiciary to Engage in a Balancing of Interests Every Time a Legitimate State Action Conflicts with the Values of a "Fit Parent."

Petitioners also argue for the first time that certiorari is warranted in this case because the Ninth Circuit's decision afforded no consideration to the presumption recognized by this Court "that fit parents act in the best interests of their children." (Petition, p. 6)

The "fit parent presumption" advanced by Petitioners is derived from this Court's decision in *Troxel v. Granville*, supra, 530 U.S. 57 – a visitation case in which the Court supported its decision by noting that "the Troxels did not allege, and no court has found, that Granville was an unfit parent." *Id.* at 58. In fact, the Court noted, "There is a presumption that fit parents act in their children's best interests." *Id.*

In this case, there was no need to apply a presumption; there is no evidence on which to question Petitioners' fitness as parents. There is also no reason to doubt "that fit parents act in the best interests of their children." What Petitioners are trying to do is expand the language of *Troxel* to mean that every time a legitimate state action conflicts with the values of a "fit parent" the judiciary is required to engage in a balancing of interests. Petitioners have extracted selective quotations from the *Meyer-Pierce* line of cases to suggest there is a "balancing" requirement in every case involving parental rights.

As noted above, the Supreme Court has cautioned courts to be "reluctant to expand the concept of substantive due process[,] because guideposts for responsible

decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). In fact, various individual members of this Court have voiced particular concern about over-extending the parental rights found in the *Pierce-Meyer* line of cases. *Troxel v. Granville*, supra, 530 U.S. at 86, fn. 7, 92 and 95-96.

In any event, it is clear the Ninth Circuit *did* balance the rights of the parents against the School District's stated objectives in this case. On the one hand, the Court of Appeals pointed out that "The Supreme Court has held that the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause." *Fields*, supra, 427 F.3d at 1204. The Court of Appeals also recognized the parents' right to privacy, which in its earliest formulation "was used essentially to protect the family structure." *Id.* at 1208 [citing *Pierce* and *Meyer*]. The Court of Appeals noted "the right to privacy also protects important parental decisions such as whether to bear children, who has control over children, and other decisions related to procreative autonomy." *Id.* In fact, the Ninth Circuit stated, "We cannot overstate the significance of these rights." *Id.*

On the other hand, the appellate court recognized the School District had:

> prepared the psychological survey as an "assessment [] to establish a community baseline measure of children's exposure to early trauma." Protecting the mental health of children falls well within the state's broad interest in education. . . . [T]he psychological survey's ultimate objective was, according to an exhibit to the complaint, to

> improve students' ability to learn. The exhibit reveals that the survey was intended to gauge exposure to early trauma and to assist in designing an intervention program to help the School District reduce barriers to students' ability to learn. Although the students who were questioned may or may not have "learned" anything from the survey itself and may or may not have been "taught" anything by the questions they were asked, the facilitation of their ability to absorb the education the school provides is without question a legitimate educational objective. *Id.* at 1209-1210.

The Ninth Circuit concluded, "Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District – whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy." *Id.* at 1206.

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems . . . *Id.* at 1205.

Thus, it is not true, as Petitioners suggest, the Ninth Circuit "failed" to recognize or even consider "the fundamental liberty interest of fit parents to direct the upbringing of their children" in the school setting. (Petition, pp. 8-9)

III. THE COURT OF APPEALS' DECISION IN THIS CASE DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

Petitioners next assert the Court of Appeals' decision in this case "hold[s] that parental rights in the school setting are nonexistent beyond that parents' choice of where to send their children to school." (Petition, p. 23) Based on that erroneous assumption, Petitioners assert the Ninth Circuit has created an "unprecedented bright line rule" which "conflicts with numerous circuit courts." (Id. at p. 19)

Based on the forgoing discussion, the School District submits that Petitioners are attempting to create a conflict between the circuit courts where none exists. In fact, the Court of Appeals cited numerous other circuit court cases in its opinion that "have recognized the constitutionality of a wide variety of state actions that intrude upon the liberty interest of parents in controlling the upbringing and education of their children." *Id.* at 1204-1205. Contrary to Petitioners' suggestion, the cases cited included decisions from the Second, Third, Fourth, and Fifth Circuits. *Id.*[4]

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[4] The cases cited by the Court of Appeals in this case, include *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir. 1998); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001).

The case from the Eleventh Circuit on which Petitioners rely, *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989),[5] does not conflict with the Ninth Circuits' opinion in this case. In *Arnold*, the Eleventh Circuit held "a parent's constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion." *Id.* at 312. However, the Eleventh Circuit declined to "constitutionally mandat[e] that counselors notify the parents of a minor who receives counseling regarding pregnancy." *Id.* at 314.

> We hold merely that the counselors must not coerce minors to refrain from communicating with their parents. The decision whether to seek parental guidance, absent law to the contrary, should rest within the discretion of the minor. As a matter of common sense, **not constitutional duty**, school counselors should encourage communication with parents regarding difficult decisions such as the one involved here. *Id.*

In so ruling, the Eleventh Circuit specifically recognized "that parental autonomy to direct the education of one's children is not beyond limitation." *Id.* at 314 [citing *Pierce*]. The *Arnold* court also concluded, as the Ninth Circuit concluded in this case, that "When parents enroll their children in public schools, they cannot demand that the educational program be tailored to their individual preferences." *Id.*

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[5] The *Arnold* opinion has since been overruled on other grounds. See *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004).

The Ninth Circuit's decision likewise recognized that Petitioners' legitimate concerns, while not constitutionally mandated by judicial action, may be addressed by other means.

> Although we reach our conclusions with little difficulty and firmly endorse the School District's authority to conduct a survey for the purposes involved here, we reiterate that we express no view on the wisdom of posing some of the particular questions asked or of conducting an inquiry into some of the particular areas surveyed by the School District. That determination is properly left to the school authorities. *Fields,* 427 F.3d at 1211.
>
> * * *
>
> What information schools provide is a matter for the school boards, not the courts, to decide. Our holding does not . . . address the propriety of the school allowing the survey to be circulated. . . . [O] ur decision does not affect the rights of parents to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation. *Fields,* 447 F.3d at 1190.

IV. THE COURT OF APPEALS DID NOT "FAIL TO RECOGNIZE PETITIONERS' DUE PROCESS RIGHTS."

Petitioners also contend certiorari should be granted because the Ninth Circuit "cast aside" Petitioners' due process claims. (Petition, p. 15)

Actually, Petitioners themselves are responsible for the Court of Appeals' "failure" to address their belated due

process claims. As the Ninth Circuit noted in its subsequent per curiam opinion on rehearing *nostra sponte*, two weeks after the Court filed its opinion, Petitioners replaced their local attorneys with a national organization located in Florida. *Fields,* 447 F.3d at 1189. Petitioners' new counsel filed a petition for rehearing en banc seeking to argue for the first time that "the panel's decision eviscerates plaintiffs' procedural due process rights." *Id.*

> Appellants' . . . argument, that our opinion "eviscerates Plaintiffs' procedural due process rights," ignores the following: (1) Appellants did not raise a procedural due process claim in the district court, (2) Appellants did not raise a procedural due process claim on appeal, and (3) our opinion did not address any procedural due process claim. We need do no more here than state the obvious: We do not address issues not presented to us, and our failure to do so does not constitute an expression of views as to the merits of any such issues.
>
> * * *
>
> Similarly, no questions relating to "state-recognized rights" were presented to us and we ruled on none. Appellants' state law claims were not before this court on appeal. The district court dismissed the state law claims without prejudice to refiling in state court, and on appeal Appellants did not raise any issue relating to that dismissal. Nor did Appellants assert any federal due process right "grounded in state-recognized rights." The only due process right presented on appeal was the *Meyer-Pierce* substantive due process right of parents to make decisions concerning the upbringing of their children along with the closely related right to privacy.

* * *

> We consider on this appeal only the issues presented by the parties initially in the district court and then to us when we heard the matter as a three-judge panel. We do not consider on rehearing new issues previously not raised, briefed or argued. *Id.* at 1189.

Since Petitioners did not timely raise any due process claim, this case is not a proper vehicle for Supreme Court review of any alleged "due process violations."

V. THE COURT OF APPEALS DID NOT MISAPPLY FEDERAL COURT DISMISSAL STANDARDS.

Petitioners also urge the Court to grant certiorari in this case because "the District Court's dismissal of a complaint without leave to amend is improper . . . " (Petition, p. 16) Petitioners accuse the Ninth Circuit of "sidestep[ping] decades of Supreme Court precedent" by "failing" to allow parents to amend their complaint. (Id.)

As with their due process claims, Petitioners ignore the fact that they themselves are to blame for this perceived shortcoming in the proceedings below. This issue was not raised by Petitioners until their petition for rehearing. In addressing petitioner's contention, the Ninth Circuit explained that "Appellants did not seek leave to amend in the district court, nor did they contend on appeal that they could have amended the complaint if permitted to so do. Thus to the extent that new counsel now complain that no amendment was permitted, their complaint is wholly without merit." *Fields*, 447 F.3d at 1189. "[T]he panel did not, as the petition asserts, 'dismiss [] on a Rule 12(b)(6) motion'; that motion was heard and granted by

the district court. We merely affirmed the district court's ruling." *Id.*

As to Petitioners' suggestion that the Ninth Circuit "had to accept as true" their allegations that the School District "had no justification or proper purpose for [its] actions" (Petition, p. 18), the Ninth Circuit observed:

> The allegation is entirely speculative and conclusory in nature. No facts are offered in support of the parents' theory. Although in other circumstances we might dismiss such an allegation with leave to amend, it is apparent here that such a dismissal could not in the end aid the parents in stating a claim. Attached to the complaint is detailed information setting forth the legitimate governmental purpose of the survey and explaining with specificity how the information obtained will be used for educational purposes and how it will ultimately benefit the School District and its children. Given the inclusion in the complaint of this specific information establishing the legitimacy of the School District's action, we must, even for purposes of a motion to dismiss, approach the application of the rational basis test from the premise that the School District had a legitimate educational purpose in undertaking the survey. *Fields*, 427 F.3d at 1209.

VI. PETITIONERS OVERSTATE THE IMPACT OF THE COURT OF APPEALS' DECISION IN THIS CASE.

Petitioners advance a theory of parental rights that would tie the hands of public school boards and their administrators in improving the quality of education in public schools. Modern developments in psychology have

given human behavioral specialists the ability to study, isolate, and overcome psychological barriers to learning. Our public schools should be praised for attempting to incorporate these scientific mechanisms into the milieu of public education. If our public schools are tasked with preparing our nation's youth for success and the ability to function productively in the modern world, this Court would do the public a great disservice by affording a select few a "veto right" over the decision of school boards and its administrators as to how students of public schools should be educated. In Petitioners' ideal world, every parent of a public school student would sit as a super-oversight board and utilize federal court's as their enforcement venue to challenge and strike down a school's course of conduct when such conduct does not conform to a parent's moral or religious world-view.

The school was acting for the benefit of the its students (and the public at large) when it sought to better its understanding of psychological barriers to learning. The contention that the Ninth Circuit "irrebuttably presumes" that public schools are acting in the a child's best interest is incorrect. No such presumption was part of the Court's holding. The suggestion that the Court's opinion somehow shield's public schools from constitutional scrutiny is a fundamental misreading of the case. The Court undertook a detailed examination of whether the state in fact had a legitimate interest in administering the survey. It explained that "education is not merely about teaching the basics of reading, writing, and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders with diverse backgrounds." *Fields*, 427 F.3d at

1209 [citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)]. The ultimate aim of the survey was to reduce barriers to students' ability to learn. This aim serves the public good and the mission of public schools to nurture and mold its student body into productive members of society. That objective was a legitimate interest of the state in the eyes of the Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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FILED
NOV 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-300

IN THE

Supreme Court of the United States

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; KATHLEEN HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHETLER,

Petitioners.

v.

PALMDALE SCHOOL DISTRICT; MICHAEL GEISSER; ARLAND ATWOOD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENTS IGNORE THE THIRD CIRCUIT'S EXPRESSED REJECTION OF THE NINTH CIRCUIT OPINION BELOW AND FAIL TO DISTINGUISH ANY OTHER CIRCUIT CONFLICT.

Respondents claim that the Ninth Circuit opinion does not conflict with other circuits, wholly ignoring *C.N. v. Ridgewood Board of Education,* 430 F.3d 159 (3d Cir. 2005).[1] While the Ninth Circuit found no parental right could be implicated by the actions of public schools once parents enroll their children, the Third Circuit held there must be a balancing test that weighs the importance of the parental decision alleged to have been usurped by the public school against the state interest served by the intrusion. *Id.* at 185; *see also Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000).

Justice Alito, while a member of the Third Circuit, joined the *Ridgewood* opinion which upheld a middle and high school survey that interfered to some degree with parental decision-making authority but expressly rejected the Ninth Circuit's holding in the case at bar:

> In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1207. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send

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[1] *Ridgewood* is neither cited nor discussed by Respondents.

> their child to public school and if so, then the claim will fail. Instead, guided by *Gruenke*, wherein this Court stressed that it is primarily the parents' right "to inculcate moral standards, religious beliefs and elements of good citizenship," 225 F.3d at 307, we have determined only that, on the facts presented, the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme court precedent.

430 F.3d at 185 n.26. By not addressing *Ridgewood*, much less attempting to distinguish it, Respondents ignore the obvious direct conflict with the Third Circuit. Incredibly, they argue no conflict exists in the circuit courts. Ignoring a direct conflict does not make it disappear. The conflict is real and must be resolved by this Court.

With the exception of *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989), Respondents did not attempt to distinguish the circuit conflicts cited in the Petition. Instead, in a conclusory sentence and footnote string cite, Respondents merely refer this Court to circuit court cases cited in the Ninth Circuit opinion below. Response, p.18 & n.4.

Respondents' attempt to distinguish *Arnold* also falls flat. In *Arnold*, the Eleventh Circuit found that the constitutionally protected parental right to direct the rearing of their child can be violated where parents find public school actions "inimical to their religious beliefs or the values they wish to install in their children." *See* 880 F.2d at 313. Respondents disregard this holding to claim there is no conflict. Respondents also ignore that the Eleventh Circuit employed the balancing test that the Ninth Circuit found unnecessary. *See id.* at 314. Respondents quote from *Arnold* about public school educational programs not needing to be tailored to parents'

individual preferences[2] but exclude the next sentence of the holding concerning the obligation public schools have to address parents' demands. Response, p.19. "Instead, a *reasonable accommodation must be found* by balancing the traditional rights of parents in the rearing of their children and the interest of the state in controlling public schools." 880 F.2d at 414 (emphasis added).

Respondents emphasize the *Arnold* court's tangential discussion limiting the scope of its holding. Response, p. 19. The Eleventh Circuit clarified it was not interpreting parental rights to require schools to notify parents when their minor receives counseling about whether to carry a pregnancy to term. *Id.* That the Eleventh Circuit declined to use *Arnold* as a vehicle for balancing the competing interests of counselors, minor children and parents on the contentious subject of parental notification on pregnancy issues is of no moment to the decision before this Court.

The Response fails to undercut Petitioners' position that this Court should grant *certiorari* to resolve the Ninth Circuit's conflict with the Second, Third, Fourth, Fifth and Eleventh Circuits.

II. RESPONDENTS MISCHARACTERIZE THE SCOPE OF PETITIONERS' ASSERTED PARENTAL RIGHT WHILE MINIMIZING THE IMPACT OF THE OPINION BELOW.

Petitioner parents have forcefully yet accurately described the seriousness of letting the opinion below stand. Respondents begin and end by claiming the Petition

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[2] Petitioners do not assert otherwise. *See infra* Section II.

overstates the impact of the Ninth Circuit's opinion. In between, they set up straw man characterizations of the nature and extent of the parental rights asserted by Petitioner. Instead of engaging Petitioners' articulation of parental rights head on, Respondents quote the lower courts' characterization of Petitioners' position and other discussions of those courts.

Notwithstanding Respondents' contrary assertions, Petitioners do not argue that they possess a free-standing fundamental right to exclusive control over the introduction of sex-related information to their children. *See* Response, p.1 & 14. Petitioners argue that the *state* does not have exclusive control over the introduction of sex-related information to elementary public school children. Petitioners clearly contend that the parents' fundamental liberty interest to direct the upbringing of their children includes "the right to exclude their children from being introduced to sexually-explicit subjects by a public elementary school." Petition, p.8 n.1. Further, the parents do not argue that their rights are absolute, but that their rights cannot be simply dismissed without determining whether the asserted governmental interest justifies its interference. *Id.* at p.11; *see Ridgewood.*, 430 F.3d at 185.

Additionally, Petitioners do not generally seek to require schools to adopt sexually-explicit curricula "in accordance with their personal and religious values and beliefs," *see* Response, pp.4-5 & 7, or to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense," *see id.* at p.7. Petitioners, as individual parents, do not seek to control the general content or substance of the speech of state educators. Neither do Petitioners advocate burdening state educational systems with an obligation to cater a curriculum for each student whose parents have a genuine moral disagreement with the school's subject matter or to permit each parent to dictate individually

what the schools teach their children. *See id.* at pp.6 & 17. The Constitution does not require such results.

The Constitution does, however, require that when state educators undertake to set up curricula or psychological studies to expose elementary school children to sexually-explicit topics, parents' moral and religious disagreements must be accommodated by permitting them a meaningful opportunity to remove their children from participation in such teaching and studies. *Cf. Arnold,* 880 F.2d at 414; *Ridgewood.,* 430 F.3d at 185*; Gruenke*, 225 F.3d at 304-307; *Moody v. Cronin,* 484 F. Supp 270, 276-277 (C.D. Ill. 1979). Despite Respondents' claims, Petitioners do not argue that parents constitutional rights "encompass a broad-based right *to restrict the flow of information* in the public schools." *See* Response, p.7 (original emphasis). Parents do, however, have a constitutional right to restrict the state's flow of sexually-explicit information to their own elementary-aged children while in public school. *Cf. Arnold,* 880 F.2d at 414; *Ridgewood,* 430 F.3d at 185*; Gruenke*, 225 F.3d at 304-307.

Moreover, Petitioners do not seek to dictate the school's timing of the introduction of such topics, *see* Response, p.4, only the ability to control their elementary school children's exposure to those topics through opting out of the objectionable portion of the curricula and studies.

Petitioners' position on the parental right to control disclosure of sensitive information has similarly been misconstrued. Respondents (and the Ninth Circuit) assert: "The parents do not allege that their children were forced to disclose private information. Their argument here is only that the survey violated their own right to make important decisions regarding the manner and timing of exposing their children to sexual matters." *Id.* at p. 7. Not so.

The complaint alleged that, with the consent of Respondents, Kristi Seymour required the elementary

students to respond to all the psychological assessment survey questions, including the sexually-explicit ones, and that the students answered them all in compliance with Seymour's instructions. The complaint asserted claims of violations of both parental rights and privacy rights.[3] Petitioner parents plainly assert "a right for families to be free from being compelled to disclose personal, sexually-explicit information to an agent of the public schools." Petition, p.8 n.1. Whether parents of elementary-aged children can assert a familial privacy right under the Constitution, which must be balanced against a public elementary school's request for compelled disclosure of personal, sexually-explicit information, is the fourth question presented in the Petition for Writ of Certiorari.

Respondents wrongly claim the scope of the fundamental liberty interest asserted by Petitioner parents cannot meet the standards articulated by this Court in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As this Court said in *Washington*, when a party asks to expand the construction of fundamental due process to include a type of right not previously found to be included, the Court must consider whether the right is one rooted in the traditions and conscience of Americans, implicit in the concept of ordered liberty, without which liberty or justice would be sacrificed. *Id.* "Our Nation's history, legal traditions, and practices" provide the "guideposts for responsible decisionmaking" that "direct and restrain" exposition of fundamental liberty interests protected by the Due Process Clause. *Id.* (citing

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[3] If Petitioners' initial complaint did not sufficiently describe the parental rights, this Court's opinion will no doubt provide guidance to ensure their first amended complaint properly states a claim upon which relief can be granted.

Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

Accordingly, such analysis is appropriate when a party seeks to expand due process protections beyond the fundamental rights and liberty interests previously recognized, such as the right to marry, the right to direct the education and upbringing of one's children, the right to use contraception, and so forth. *Washington*, 521 U.S. at 720-721. For example, in *Washington*, this Court found an insufficient historical basis for a due process-protected right to commit suicide which would include a right to have assistance in doing so. *Id.* at 723. Petitioners are not seeking to expand, but merely to be protected by the fundamental liberty interest of parents to direct the upbringing of their children, the oldest fundamental right recognized by this Court. *See* Petition, p.8 n.1. The adequacy of the historic underpinnings of that fundamental right has been well established and is simply not at issue.

The language Petitioners use to characterize the Ninth Circuit's opinion is commensurate with the gravity of the parental rights at stake. Despite Respondents' claims, Petitioners have not employed hyperbole nor embellished the facts. *See* Response, p.1. Either over the Petitioner parents' objections or without their informed consent, their seven-through ten-year-olds, for the first time in their short lives, were forced to ponder and calculate the frequency with which they had certain sexual activity and sexual thoughts, and then disclose their answers to agents of their elementary school. The questions covered the weighty topics of masturbation ("Touching my private parts too much"); sexual imagery ("Thinking about having sex."); lust ("Thinking about touching other people's private parts"); sex ("Thinking about sex when I don't want to"); sexual opportunism ("Not trusting people because they might want sex"); sexual anxiety ("Getting scared or upset when I think about sex"and "Getting upset when people talk about sex"); sex drive ("Having sex

feelings in my body"); sexual compulsions ("Can't stop thinking about sex"); and sexual assault ("Have you ever . . . Been touched by someone, on your body, that made you feel uncomfortable?"). The language of the petition is only as inflammatory as the facts of the case.

The Ninth Circuit has declared that the introduction of those topics to elementary-aged children cannot implicate the Constitution or involve the federal courts. The parents of the children subjected to those questions cannot overstate the public importance of correcting that error.

III. RESPONDENTS DEMONSTRATE THE ERROR BELOW BY RELYING ON DISPUTED FACTS OUTSIDE THE COMPLAINT TO SUPPORT AFFIRMING THE DISMISSAL.

Respondents argue their position as though the opinions below were issued after evidence was presented and findings of fact were made. The trial court granted a Rule 12(b)(6) motion to dismiss with prejudice and the Ninth circuit affirmed that ruling. It is elementary that all factual allegations in the complaint must be accepted as true when considering a Rule 12(b)(6) motion. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Respondents (and the Ninth Circuit) improperly rationalize affirming the dismissal with "facts" that either were not in the complaint or were expressly alleged to be false in the complaint.

Respondents' Statement of the Case contains "facts" that are inconsistent with Petitioners' averments in the complaint. The letter seeking consent for a study, attached as Exhibit "A" to the complaint, was also alleged in paragraphs 28-30 and 34 of the complaint to have been false, incorrect, an inaccurate disclosure, deliberately incomplete, and containing

misrepresentations as to the nature and content of the psychological assessment survey. Nevertheless, Respondents cite assertions from the letter as though they were established facts that this Court should consider in its deliberations. *See* Response, pp.1-2 & 23-25.

For instance, the complaint states that the Palmdale School District's claim it was administering the psychological assessment survey as a "collaborative effort" with the California School of Professional Psychology was false and was made for the purpose of deceiving Petitioners about the true study sponsor and obtaining parental consent under false pretenses. *Compare* Response, p.1. Respondents adopt the false letter's version of the purpose and goal of the study, as well as its version of the use the District would make of the information disclosed. *Id.* at pp.1 & 24-25. Respondents ignore the complaint's allegations concerning the letter to assert that "the consent form informed the parents of the questionnaire's nature and purpose." *Id.* at p.2.

The School District responded to Petitioners' declaration of Ninth Circuit error in reviewing a dismissal by quoting the Ninth Circuit's opinion and blaming Petitioners' predecessor counsel. *Id.* at p.22-23. The quoted portion of the opinion actually highlights the Ninth Circuit error. In an alternative holding, the Ninth Circuit considered whether the School District's actions met a rational basis test notwithstanding contrary allegations in the complaint. The Ninth Circuit claimed justification in ignoring the complaint's allegations because they were speculative, conclusory and lacked facts offered in support. *Fields*, 427 F.3d at 1209. Under those circumstances, the harshest result one would expect would be entry of an order of dismissal with leave to amend. The Ninth Circuit recognized the general appropriateness of such a result but declined to order it nonetheless.

> Although in other circumstances we might dismiss such an allegation with leave to amend, it is apparent here that such a dismissal could not in the end aid the parents in stating a claim. Attached to the complaint is detailed information setting forth the legitimate governmental purpose of the survey and explaining with specificity how the information obtained will be used for educational purposes and how it will ultimately benefit the School District and its children.

Id. at 1209. Then, without qualification, the Ninth Circuit relied upon the contents of the very letter alleged to be untrue as "establishing the legitimacy of the School District's action." *Id.*

There can be no clearer error when a fact in direct conflict with the complaint can be found to be "established" for purposes of affirming a dismissal without leave to amend.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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MOTION FILED
NOV 0 1 2006

(3)

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF UNITED STATES CONGRESSMEN TIM MURPHY, ROB BISHOP, TOM FEENEY, LOUIS GOHMERT, PATRICK MCHENRY, AND PAUL RYAN AND THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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November 1, 2006

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Sup. Ct. R. 37, the below listed United States Congressmen and the Thomas More Law Center respectfully submit this motion for leave to file the accompanying brief of amici curiae in support of the granting of the petition for a writ of certiorari.

Representative Tim Murphy (R-PA) authored and sponsored House Resolution 547, which expressed the sense of the House of Representatives that the United States Court of Appeals for the Ninth Circuit deplorably infringed on parental rights in *Fields v. Palmdale School District.* (App., hereto, at 1-3.) Representatives Rob Bishop (R-UT), Tom Feeney (R-FL), Louis Gohmert (R-TX), Patrick McHenry (R-NC), and Paul Ryan (R-WI) were co-sponsors of House Resolution 547, which the House of Representatives adopted by a vote of 320 to 91. Each of these Representatives has an interest in upholding the rights of parents to direct and control the upbringing of their children. They urge this Court to grant the petition for a writ of certiorari.

The Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan, and does not charge for its legal services. The Law Center has represented, and will continue to represent, parents in court to advance their rights, and the rights of their children, against public schools that have violated those rights. As with the Representatives, the Law Center supports the rights of parents to direct the upbringing of their children, even when attending public schools, especially with regard to religious and moral values. The Law Center has an interest in the outcome of this case, which involves legal principles impacting the public. The Law

Center urges this Court to grant the petition for a writ of certiorari.

The submitted amici curiae brief is intended to assist this Court in its analysis of the legal questions presented by the petition for a writ of certiorari. As explained in the accompanying brief, parents have a fundamental right to direct the upbringing of their children, including their religious and moral upbringing. This right encompasses controlling the sexually explicit information that is distributed to their minor children. The Ninth Circuit wrongly concluded that parental rights are eviscerated when children attend public school. The rights of parents must be balanced against the interest of a public school in providing universal education. The Ninth Circuit wrongly ignored this balancing test and wrongly rejected the fundamental rights parents continue to have while their children attend public school.

The undersigned attorney has received the consent for the filing of the amici curiae brief from petitioners' counsel. A copy of that consent letter has been filed with this motion. Respondents' counsel has withheld consent.

The amici curiae respectfully request that this Court grant this motion for leave to file the accompanying brief.

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IDENTITY AND INTEREST OF AMICI CURIAE

Representative Tim Murphy (R-PA) authored and sponsored House Resolution 547, which expressed the sense of the House of Representatives that the United States Court of Appeals for the Ninth Circuit deplorably infringed on parental rights in *Fields v. Palmdale School District*. (App., hereto, at 1-3.) Representatives Rob Bishop (R-UT), Tom Feeney (R-FL), Louis Gohmert (R-TX), Patrick McHenry (R-NC), and Paul Ryan (R-WI) were co-sponsors of House Resolution 547, which the House of Representatives adopted by a vote of 320 to 91. Each of these Representatives has an interest in upholding the rights of parents to direct and control the upbringing of their children. They urge this Court to grant the petition for a writ of certiorari.[1]

The Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan, and does not charge for its legal services. The Law Center has represented, and will continue to represent, parents in court to advance their rights, and the rights of their children, against public schools that have violated those rights. As with the Representatives, the Law Center supports the rights of parents to direct the upbringing of their children, even when attending public schools, especially with regard to religious and moral values. The Law Center has an interest in the outcome of this case, which involves legal principles impacting the public. The Law

[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from the amici curiae has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The amici curiae have no parent corporations and no stock. Sup. Ct. R. 29.6.

Center urges this Court to grant the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

Parents have a fundamental right to direct the upbringing of their children. Controlling the sexually explicit information that is distributed to their minor children falls under that right. Parental rights are not eviscerated when their children attend public schools, as the United States Court of Appeals for the Ninth Circuit ruled in this case. This is particularly true when the religious beliefs and practices of the family are implicated.

When a conflict exists between parents' fundamental rights concerning the religious upbringing of their children and a public school's interest in universal education, a balancing test must be employed to determine the appropriate outcome, which the Ninth Circuit failed to acknowledge or impose in this case. In this instance, Palmdale School District's interest in administering a sexually explicit survey to seven and ten year-olds is outweighed by petitioners' interest in protecting their children from this information so that they may raise their children according to their religious or moral beliefs.

ARGUMENT

A. *Parents have a fundamental right to direct the upbringing of their children.* The Ninth Circuit panel erred in concluding that the right of parents to control the sexual information presented to their children has no deep roots in our nation and is not implied in our concept of ordered liberty. According to the panel, parents have in essence no fundamental constitutional right over their children while their children are in public school, and a public school may provide young children with whatever sexually-based information the school sees fit, even though a fully informed parent would never allow his or her child to be exposed to such information, based on religious or moral grounds. The Ninth Circuit's decision is in conflict with the case law of this Court as well as with the case law of other circuit courts.

As this Court has repeatedly stated, the fundamental right of parents to direct the upbringing of their children is a well-established liberty interest under the Fourteenth Amendment to the United States Constitution.

This Court stated that this interest "[w]ithout doubt, denotes . . . the right of the individual . . . to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Shortly thereafter, this Court elaborated, holding that an Oregon Act compelling parents to send their children to public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). This Court recently affirmed this right by noting that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the

fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

The fundamental right of parents over their children includes many areas of family life. This Fourteenth Amendment liberty grants parents the right to decide what type of school their child will attend, to decide whether their child may learn a foreign language, to decide that religious beliefs compel exemption from compulsory school education, and to decide whether to allow visitation with other family members. *Troxel v. Granville,* 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In *Yoder*, 406 U.S. at 213-14, this Court explained that religion is an aspect of the fundamental right elucidated in *Pierce*. This Court characterized the right as "the traditional interest of parents with respect to the religious upbringing of their children," *id.* at 214, and explained that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213.

Beyond these constitutional rights, parents also have statutory rights over their children's education. In 2002, the United States Congress enacted a federal law that no student can be required to take a survey concerning sexual behavior or attitudes unless the school provides parents with the survey before administering the survey

to students and receives consent to administer the survey.[2] 20 U.S.C. § 1232h; *accord* Cal. Educ. Code § 51513. In addition, many states have in place laws regulating public school education that require schools to allow parents to opt their children out of certain classes and surveys dealing with sex education.[3] These federal and state laws are further evidence of the fact that parents' right to control their children's exposure to sexual education is deeply rooted in our nation's concept of ordered liberty.

The right of parents to direct the religious upbringing of their children is an established right. Sincerely held religious beliefs direct a family's mode of life, and, unsurprisingly, direct decisions on life-defining topics such as sexual activity and education. The proposition that parents have a right to direct the introduction and flow of sexual information to their children follows from these principals.

B. ***The fundamental right of parents to direct the upbringing of their children extends beyond the schoolhouse door.*** Under the Ninth Circuit panel's decision, parents' fundamental rights are eliminated for the period of time that the child is attending public school since the panel ruled that a public school may impart any

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[2] Here, the Palmdale School District subjected adolescent children, ages seven to ten, to a sexually-explicit psychological assessment survey, asking them such questions as whether they touch their "private parts too much," whether they have "sex feelings in my body," and whether they think about "having sex," all without their parents' informed consent. (Pet. at 2-3.)

[3] *E.g.*, Ariz. Rev. Stat. § 15-716; Idaho Code § 33-1611; Nev. Rev. Stat. § 389.065; Or. Rev. Stat. § 336.465; Wash. Rev. Code § 28.A.230.070.

sexually-based information to students even if their parents would object on religious or moral grounds.

The Ninth Circuit's decision conflicts with decisions from other circuit courts, which is grounds for this Court to grant the petition for a writ of certiorari. Sup. Ct. R. 10(a). Unlike the Ninth Circuit, the United States Court of Appeals for the Third Circuit has affirmed the reach of parental rights into public school in *Gruenke v. Seip*, 225 F.3d 290 (3rd Cir. 2000). In that case, a coach compelled a female student to take a pregnancy test without informing her parents. The coach made those results known to the school community, which prevented the plaintiff student and her parents from dealing with the pregnancy in a confidential manner. The Third Circuit explained:

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. *See Merriken v. Cressman*, 364 F. Supp. 913, 922 (E.D. Pa. 1973) (questionnaire probing family relationships by school authorities held unconstitutional). *Public schools must not forget that "in loco parentis" does not mean "displace parents."*[4]

Id. at 307.

In *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3rd Cir. 2005), the Third Circuit, unlike the Ninth Circuit, again affirmed that parental rights apply even when children attend public school. In fact, the Third Circuit

[4] All emphasis added herein unless otherwise noted.

criticized *Fields*, noting that although they did not find a constitutional violation in *Ridgewood Bd. of Educ.*, they disagreed with the holding in *Fields*:

> In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1206. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail.

Id. at 185 n.26.

The United States Court of Appeals for the Eleventh Circuit agrees that the *Meyer-Pierce* right exists beyond the schoolhouse gate. In *Arnold v. Bd. of Educ. of Escambia*, 880 F.2d 305 (11th Cir. 1989), *rev'd in part on other grounds by Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004), a student's guidance counselor and principal convinced her to have an abortion without telling her parents. The Eleventh Circuit held that a parent's constitutional right to direct the upbringing of the minor was violated because the school excluded the parents from their daughter's decision about whether to have an abortion, a decision which touches fundamental values and religious beliefs parents wish to instill in their children. *Id.* at 312.

In *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979), the district court held that an Illinois law requiring public school students to attend co-ed physical education classes

violated both the plaintiff parents' right to control the religious upbringing of their children and the plaintiff students' right to free exercise:

> This exposure also *substantially interferes* with the religious development of the Pentecostal children and their integration into the way of life of the Pentecostal faith community at the crucial adolescent stage of development. These two effects of the way this Illinois statute has been construed contravenes the basic religious tenets and practice of the Pentecostal Church, *both as to parents and the children.*

Id. at 276.

In *Moody*, as here, the issue is not whether parents or courts have the right to tell schools "what they must do, only what they may not do." *Id.* at 277. It should be a matter of common sense that parents have the right to object to school action when that action is shockingly offensive, unjustified, and impinges upon parents' right to direct the religious upbringing of their children, such as forcing elementary school children to take a sex survey in which seven to ten year-olds are asked such questions as whether they think "about touching other people's private parts." Again, "Public schools must not forget that 'in loco parentis' does not mean 'displace parents.'" *Gruenke*, 225 F.3d at 307.

The above cases illustrate that school action touching upon sexual matters implicates parental rights, including familial religious beliefs and decisions. In particular, the *Gruenke* court explicitly ruled that psychological testing in school can violate parents' fundamental right to raise their children. The contrary decision of the Ninth Circuit panel is cause for this Court's review. *See* Sup. R. Ct. 10(a).

C. ***The parents' interest in the upbringing of their children outweighs the public school's interests in conducting a sex survey on adolescents.*** Although parents retain their fundamental rights over their children even when their children attend public school, it is also true that the state has an interest in the orderly and uniform regulation of its public schools. The controlling issue is what happens when the interests of the state and the rights of parents collide. The Ninth Circuit panel ignored this issue.

In *Yoder*, this Court stated that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children." *Yoder*, 406 U.S. at 214; *accord Arnold*, 880 F.2d at 313 (when the state interest impinges upon . . . the traditional interest of parents . . . *the state interest must be balanced against the interests of the parent*).

The Ninth Circuit's decision rejected any balancing of the competing interests of parents and the public school, which is a rebuff of *Yoder*. Based on the Ninth Circuit's decision, courts will have no need to determine whether the state is achieving its interest in a manner that is appropriate and also the least restrictive of a parent's rights. *See Moody*, 484 F. Supp. at 276.

Under the Ninth Circuit's totalitarian view, once a child enters public school, the public school can do as it pleases and even ask seven year-olds whether they think about sex and about touching their private parts or those of their friends. The parents only recourse is to remove

their children from the public schools and either home school them or send them to private school, which are not true options for many parents lacking the wherewithal.

Based on the Ninth Circuit's decision, the public school has displaced the parent during school hours and has taken control of the child, in total contravention of basic principles set forth by this Court. *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.").

CONCLUSION

This Court should grant a writ of certiorari. This Court should resolve the questions of national importance presented by this case and resolve the conflict caused by the Ninth Circuit's decision.

Respectfully submitted,
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November 1, 2006

H. Res. 547

In the House of Representatives, U.S.,
November 16, 2005.

Whereas the Palmdale School District sent parents of elementary school students at Mesquite Elementary School in Palmdale, California a letter requesting consent to give a psychological assessment questionnaire to their first, third, and fifth grade students;

Whereas without the informed consent of their parents, the young students were instead administered a questionnaire that contained sexually explicit and developmentally inappropriate questions;

Whereas seven parents subsequently filed a complaint against the Palmdale School District in a Federal district court;

Whereas on November 2, 2005, a 3-judge panel of the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the Central District of California in the case (Fields v. Palmdale School District) and held that parents "have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so";

Whereas the Ninth Circuit stated, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished";

Whereas in Meyer v. Nebraska, 262 U.S. 390, 401 (1923), the Supreme Court recognized that the liberty guaranteed by the 14th amendment to the Constitution encompasses "the power of parents to control the education of their [children]".

Whereas the Supreme Court in Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), highlighted the Meyer doctrine that parents and guardians have the liberty "to direct the upbringing and education of children under control" and emphasized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations";

Whereas in Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972), the Supreme Court acknowledged that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . The duty to prepare the child for 'additional obligations', referred to by the Court [in Pierce] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship";

Whereas a plurality of the Supreme Court has stated, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" (Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion));

Whereas the Ninth Circuit's decision in Fields v. Palmdale School District presupposes that "parents make the choice as to which school their children will attend" when, in fact, many parents do not have such a choice;

Whereas the decision in Fields establishes a dangerous precedent for limiting parental involvement in the public education of their children; and

Whereas the rights of parents ought to be strengthened whenever possible as they are the cornerstone of American society: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that –

(1) the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions;

(2) the Ninth Circuit's ruling in Fields v. Palmdale School District undermines the fundamental right of parents to direct the upbringing of their children; and

(3) the United States Court of Appeals for the Ninth Circuit should agree to rehear the case en banc in order to reverse this constitutionally infirm ruling.

Attest:

Clerk: